87-820

Supreme Court, U.S.
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No. A-214

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

EDNA S. KELLAM, KATHRYN L. KELLAM and JAMES L. KELLAM

Appellants

v

JAMES P. PFEIFER, SHIRLEY A. PFEIFER, GARRETT K. SPATES, HELEN M. SPATES, THOMAS L. SULLIVAN, PATRICIA J. SULLIVAN, CHRIS LOUKAS, SAFECO TITLE INSURANCE COMPANY, INC., SAFECO BONDING COMPANY, INC., BIRTH DEVELOPMENT COMPANY, INC., RED CORPORATION, BLUE CORPORATION, ROE COMPANY, a co-partnership, RICHARD ROE I to RICHARD ROE X, doing business as ROE COMPANY, a co-partnership, JOHN DOE 2 to JOHN DOE 100, WILLIAM L. DIETERLE

Appellees

APPEAL FROM THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT OF CALIFORNIA DIVISION II

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I

Whether or not the Court below applied the substantive rules of law, (1) res judicata and (2) the law of the case, to a California (Civil Code Section 1161a) Unlawful Detainer Judgment in such an opertive manner as to deprive appellants of "an opportunity to present every available defense" within the due process of law requirements of the 5th Amendment; and of the 14th Amendment; each of the Constitution of the United States?

II

Whether or not the decisions of the California Courts have so far infected and dissolved the definition of the duties of a Trustee in the word Trustee as it is applied in the Contractual California Trust Deed cases; as applied in non-judicial foreclosure proceedings within the provisions of section 2924 et seq, Civil Code of California and summary Unlawful Detainer Proceedings provided for in Section 1161a et seq Code of Civil Procedure of California -as to render the entire system of non-judicial foreclosure, and subsequent summary Unlawful Detainer proceedings based thereon state action and unconstitutional upon its face as a denial of due process of law requirements of the 5th Amendment; and of the 14th Amendment; each of the Constitution of the United States?

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JURISDICTIONAL STATEMENT

Pursuant to Rule 15 of the Rules of the Supreme Court of the United States, appellants, EDNA S. KELLAM, KATHRYN L. KELLAM, and JAMES L. KELLAM (KELLAMS), file this Statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the Opinion of the Court of Appeal affirming the order of the Trial Court sustaining demurrer without leave to amend, and dismissal of appellants case based thereon, entered by the Court of Appeal, Fourth Appellate District, Division II, of the State of California, in this case and should exercise such jurisdiction herein.

GROUNDS OF JURISDICTION OF THE SUPREME COURT

This appeal arises from an action (hereinafter KELLAM II) to recover realty and damages resulting from the constructive fraud of Trustee Safeco Title Insurance Co. (SAFECO) and James P. Pfeifer (PFEIFER) and others to whom the KELLAMS, plaintiffs, had conveyed title to four family residences to Trustee SAFECO under the terms of a statutory 1st and 2nd California Trust Deed, for the use of power of sale, upon demand of the beneficiary, as security for payment of a 1st and 2nd promissory note. Trustee SAFECO, however, did not use the trustee's power of sale for that purpose, but rather to use non-judicial foreclosure proceedings of the 2nd Trust Deed, to discover a 3rd Trust Deed in default upon the same property, acquire the same from the beneficiary and at the curing of the non-judicial foreclosure of the 2nd Trust Deed by the KELLAMS, to time non-judicial foreclosure of the 3rd Trust Deed, in a manner from which the KELLAMS could not recover and to broker the 3rd Trust Deed to Trustee Foreclosure Officer LOUKAS and PFEIFERS, as an "Investment in Foreclosure." And after sale, to convey the realty by SAFECO's Trustee's Deed to Trustee Foreclosure Officer LOUKAS and PFEIFER in PFEIFER's name alone. Thereafter, to obtain possession of the realty, they presented their fraudulent Trustee's Deed in California Unlawful Detainer Proceedings, evicting the KELLAMS and packaged and disposed of a part of the realty for the use and benefit of the conspirators.

The Trial Court sustained demurrer without leave to amend June 11, 1984 (App. B), which was in KELLAM II, affirmed by the Court of Appeal of California, 4th Appellate District, Division II, and filed May 15, 1987 (App. A). A Petition for Rehearing in

the same Court was Denied and Filed June 5, 1987 (App. H). A Petition for Review presented to the Supreme Court of California was Denied and Filed August 15, 1987 (App. I). A timely notice of appeal was filed on September 3, 1987, in the Court of Appeal of California, Fourth Appellate District, Division II, 303 W. Third St., San Bernardino, California 92401, and a copy thereof with the Trial Court, Superior Court of the County of Riverside, State of California, 4050 Main St., Riverside, California 92501. The jurisdiction of this Court is invoked under the provisions of Title 28 United States Code, section 1257, subparagraph (2).

Cases that sustain the jurisdiction of this Court include: Inasmuch as it is the right of the party to be protected against a law which violates constitutional right, whether by its terms or manner of its enforcement, decision which denies such protection gives effect to law and is reviewable by the United States Supreme Court. General Oil Co. v. Crain (1908) 209 US 211, 52 L Ed 754, 28 S Ct 475, Charleston Federal Sav. & Loan Assoc. v. Alderson (1945) 324 U.S. 182, 89L Ed 857, 65 S Ct 863, Lindsay v. Normet (1972) 405 US 56, 131 LEd2d 36, 92 S Ct 862, American Surety Co. v. Baldwin (1932) 287 U.S. 156, 168; 53 S Ct 98, 102, 77 L Ed. 231, Nickey v. Mississippi (1934) 292 U.S. 393, 396, 54 S Ct 743, 744, 78 L Ed. 1323, Grant Timber & Mfg. Co. v. Gray (1915) 236 U.S. 133, 35 S Ct 279, 59L.Ed. 501, Bianchi v. Morales (1923) 262 U.S. 170, 43 S Ct 526, 67 L.Ed. 928.

STATEMENT OF FACTS

The KELLAMS have never had their day in court for a trial upon the merits for the tortious taking of their ancestral homes. There never has been an evidentiary hearing of any kind. Although they have always pursued that end and in July of 1979, the KELLAMS, in KELLAM I, offered a stipulation, the

purpose of which was a full and fair trial upon the merits for all, including defaulting Respondents, which was accepted by PFEIFERS, Respondents, and rejected by SAFECO. No sooner was the ink dry, when PFEIFERS and the other RESPONDENTS reneged, and joined SAFECO in its bad practice motion for judgment on the pleadings.

The KELLAMS have always sought trial upon the merits but as to them, in all cases, Unlawful Detainer. KELLAM I and KELLAM II, the pleadings have become an end in themselves, against the teachings of Justice Curtis in Buxbom v. Smith (1944) 23 C.2d 535, 542; Justice Tobriner in Skopp v. Weaver (1976) 16 C.3d 432, 438; and Justice McDaniel in Wellis v. Superior Court (Kroehler Mfg. Co.) (1984) 160 CaLApp.3d 1109, 1116.

When there is a trial upon the merits in this case, Appellants represent to the court that the evidence will show the following facts:

The real property in question is owned by the KELLAMS and was occupied by the KELLAMS. It was a naval orange orchard of twenty-six acres. Together with a six bedroom residence, occupied by Appellant JAMES and his family; a two-bedroom apartment occupied by Appellant EDNA, JAMES' mother, a two-bedroom apartment occupied by Appellant KATHRYN's mother, each apartment situated in opposite ends of a barn, which was 130' in length. There, also, was a mobile home residence where KATHRYN's father resided. There were a total of four residences upon the realty, together with a reservoir and a well and pumping station producing twenty-five miner's inches of water, continuous flow. The realty is situated on Dufferin Avenue at Jackson Street in the City of Riverside, State of California, across the street from the State Citrus

Heritage Park and is very valuable property. The KELLAMS and their ancestors have owned the realty since 1904. (C.T. 460, 461, 462)

Upon the KELLAMS homes and orchards, there was a First Trust Deed of $25,000.00 where SAFECO was Trustee, and the Federal Land Bank beneficiary, a Second Trust Deed of $25,000.00 where Safeco was Trustee, and the Clouds beneficiaries, and a Third Trust Deed of $4,000.00 (to which SAFECO was a stranger), Trustors Security Service was Trustee, and Lord was beneficiary. At the time the realty had a market value well over $1,000,000.00 in June and July, 1973, and presently having a value well over $2,000,000.00. (C.T. 461,462)

For several years prior to July, 1973, JAMES P. PFEIFER, the money man, and his wife, SHIRLEY (PFEIFERS) and GARRETT K. SPATES, a real estate broker, and his wife, HELEN (SPATES), THOMAS L. SULLIVAN, and his wife, PATRICIA (SULLIVANS) and CHRIS LOUKAS, Trustee Foreclosure Officer, without audit, (LOUKAS) for SAFECO TITLE INSURANCE COMPANY, INC., and its predecessor SECURITY TITLE INSURANCE CO., (each hereinafter SAFECO) as tortious conspirators, were engaged in the business of brokering distressed real property, which they denominated "Investments in Foreclosure." LOUKAS, in the course of and in breach of his fiduciary duties, would come upon "good deals," -that is he would discover in a Trustee's Sale proceedings, a Note and Trust Deed which could be purchased from the beneficiary thereof at a fraction of the value of the note and of the value of the real property, which he could foreclose in a manner from which the Trustor could not likely recover. He used other persons' names to shelter his interest because of his position as Trustee Foreclosure Officer, and he and SPATES, the Real Estate Broker,

and PFEIFERS, the money man, and SULLIVANS, would comspire in joint venture and "invest in a foreclosure," and all together purchase the aforesaid interest of the beneficiary, and clandestinely forclose by Trustee's sale, without disclosing the interest of the Trustee, or his activities, until the realty had been packaged and disposed of for the benefit of the group and until statute of limitations rendered their tortious taking secure—thusly acquiring the distressed real property, or at the very least, money to which they were not entitled, upon their "Investment in Foreclosure." (C.T. 464)

SAFECO and LOUKAS were in a fudiciary capacity toward the KELLAMS by reason of their agreement to act as Trustee and dual agent upon the KELLAMS' second deed of trust, and did so in foreclosure proceedings wherein A.L. and Fannie Cloud were beneficiaries, in SAFECO's predecessor's Trustee's Sale proceedings number T.S. 9476. (C.T. 462, 463, 478)

SAFECO and LOUKAS were, in fact, in a fudiciary relationship with the KELLAMS by reason of a relationship of trust and confidence created by Trustee Foreclosure Officer, CHRIS LOUKAS, during the period of approximately one and one half years wherein all communications with relation to foreclosure T.S. 9476 by the KELLAMS to SAFECO were oral, and acted upon by CHRIS LOUKAS with the utmost integrity, in negotiations for numerous postponements by LOUKAS on behalf of Plaintiffs with the beneficiary. LOUKAS had reason to know and did know that the KELLAMS relied upon his advise and integrity, and he, in fact, exercised undue influence over them. (C.T. 462, 463, 476)

Times had been hard, but the KELLAMS had been able to maintain the property and the encumbrances, except the Third Note and Trust Deed, which was

long in default; however, upon which there had been no activity to foreclose. The Second Trust Deed had been in and out of the Trustee's Sale Proceedings during the two year period prior to July 11, 1973, and the Trustee Foreclosure Officer was LOUKAS.

LOUKAS, in his fudiciary capacity in a Trustee's Sale Proceedings, which were cured on July 11, 1973, after many continuances thereof by the beneficiary, "came upon one of his good deals," the KELLAMS' Third Note and Trust Deed of $4,500.00. In that capacity, he learned by reason of the necessary continuances, and disclosures made to him as Trustee by Trustors, that they were in extreme, though temporary, financial distress, had no borrowing capacity, and had no funds by reason of the curing of the foreclosure of the second, aforesaid. He also learned that for these reasons, the KELLAMS could not likely survive a well timed, sudden and unyielding Trustee's Sale of the very valuable realty. (C.T. 471, 472)

LOUKAS, PFEIFERS and the other respondents in different points in time, including SAFECO, decided to destroy KELLAMS' title to their family homes and orchards and to acquire title for themselves, obtain possession, and the rents and profits and dispose of the realty to the benefit of the group. All through a series of clandestine actions of a faithless fiduciary, SAFECO's CHRIS LOUKAS, Foreclosure Department Head, Trustee Foreclosure Officer (LOUKAS), designed to mislead the KELLAMS as to the persons and their activities, acting in concert in the acquisition of and tortious foreclosure of a Third Trust Deed, and sham non-judicial foreclosure sale to themselves. Purposeful concealment of the facts at all times was the essential ingredient of the tortious taking of the realty in a manner constituting theft, actual fraud, and the giving of false evidence

and testimony—to the end that the possession, rents and profits—and the ultimate disposition of their family homes and orchards and water rights for the benefit of the group, and those transactions would never be questioned by the KELLAMS. Purposeful concealment was designed by conspirators to prevent the KELLAMS from presenting claims based thereon, and a fair opportunity to fully present their case in a jury trial upon the merits—until the group could plead the Statute of Limitations rendering their tortious taking complete and secure from the law. (C.T. 464, 477, 478, 847, 848, 849)

This conduct although sufficient to plead the tortious taking and purposeful concealment of the tortious taking, as joint tort feasors, and those who aided therein, is pleaded in Appellants Second Amended Complaint as the purpose and scope of a conspiracy beginning July, 1973, (C.T. 477) and continuing to within a few weeks before July 27, 1979 (C.T. 464, 477, 478, 481, 847, 848, 849) with attendant overt acts committed in the furtherance of the conspiracy to tortiously take and purposely conceal such taking forever, and all the while exercising daily dominion and control over the realty and receiving its rents and profits. As overt acts, it is alleged that all defendants, together with joining Birth Development Company and William L. Dieterle destroyed the citrus orchards, irrigation system, the well producing twenty-five miner's inches per day, and they did wrongfully dispose of Gage Canal Water Stock, and they did wrongfully build and sell houses over a recorded Lis Pendens, and did permit building on the premises to be vandalized at the time the Second Amended Complaint was filed, July 27, 1979. (C.T. 475, 476, 477) And if there ever is a trial upon the merits, the evidence will show that on July 27, 1979, as overt acts in furtherance of the conspiracy to take the realty, LOUKAS, PFEIFERS, SPATES and SULLIVANS were

receiving the rents and profits, packaging and disposing of the real property, building and selling houses, listing the property with real estate brokers for advertising for sale. While at the same time, SAFECO was aiding the packaging and disposing of the property by issuing policies of Title Insurance, profiting thereon and providing attorneys to all purchasers to guarantee the title, which they knew was tortiously taken in a manner constituting theft and was, therefore, void as more particularly hereinafter set forth. (C.T. 478, line 28, 479) Furthermore, at the time of the preparation of this brief, the conspirators have not yet completed the purpose of the conspiracy and are still in the process of exercising dominion and control, and receiving the rents and profits, and packaging and disposing of the KELLAMS' realty, for the use and benefit of the conspirators.

Central to the plan was a purposeful concealment of the true facts, that the police, and the KELLAMS, would not be alerted that the apparently legitimate foreclosure of their realty was, in fact, the taking of it in a manner constituting theft and continuing purposeful concealment, pending packaging and disposing of the rents and profits for the benefit of the conspirators, purposeful concealment designed by the conspirators to prevent the KELLAMS from presenting claims based thereon, and a fair opportunity to fully present their case in a jury trial upon the merits until the conspirators could seek the shelter of the statute of limitations. Overt acts of continuing purposeful concealment are alleged beginning July, 1973, and continuing by SAFECO at the time the Second Amended Complaint was filed July 27, 1979. (C.T. 477, line 17, 481, 847, 848, 849)

Purposeful concealment of Trustee LOUKAS'

activities in the taking of the KELLAMS' realty in a manner constituting theft was essential to a dilatory motion for judgment on the pleadings and inducing the passing of time until the shield of the statute of limitations could be pleaded.

SAFECO continuously and purposefully concealed the fact that LOUKAS and SAFECO had tortiously taken and embezzled the KELLAMS' realty from the KELLAMS—and from their own attorneys—to the end that their own attorneys could make a dilatory and successful motion for judgment on the pleadings at the onset of trial, swearing that they knew nothing of LOUKAS' embezzlement activities of the KELLAMS' realty and, therefore, permission to amend should not be granted.

Or, in the alternative, SAFECO's attorneys, as independent contractors, with full knowledge of the facts that LOUKAS and SAFECO had tortiously taken the KELLAMS' realty in a manner constituting theft by embezzlement—made a dilatory motion for judgment on the pleadings at the outset of trial, swearing that they knew nothing of LOUKAS' embezzlement of the KELLAMS' realty and, therefore, permission to amend should not be granted. In either case, such purposeful concealment of LOUKAS' activities was essential to a dilatory motion for judgment on the pleadings at the outset of trial and to the passage of time, until SAFECO and the other Respondents could shield their tortious taking with the statute of limitations. (C.T. 912, line 16, 913, 194, 195) The facts are plead, of overt acts in furtherance of the conspiracy right up to the time of the filing of the complaint, including the selling of houses for the benefit of the group. Although it admittedly could be better pled, the facts were pleaded and are available to plead by amendment.

STATEMENT OF THE CASE

In the spring of 1975, there was a case set for jury trial, wherein Appellants had paid the Jury Fees—entitled "EDNA S. KELLAM, KATHRYN L. KELLAM and JAMES L. KELLAM, Plaintiffs, vs. JAMES P. PFEIFER and SHIRLEY A. PFEIFER, BLACK CORPORATION, WHITE CORPORATION . . . JOHN DOE I to JOHN DOE X . . . Defendants." Superior Court, Riverside County, Case No. 109876, which was appealed and became Court of Appeal, Fourth Appellate District Division Two, Number 4th Civil No. 21945, in the instant case, Respondents have named it KELLAM I by an analogy to Sawyer v. First City Financial Corp. 124 Cal.App.3d 390; and its companion case Livett v. F.C. Financial Associates 124 Cal.App.3d 413—cases strikingly similar factually to the instant action, which they denominated KELLAM II. (C.T. 582, 583) (Hereinafter KELLAM I, and the instant case KELLAM II.) In KELLAM II, Respondents requested the Trial Court, upon demurrer, to take judicial notice of the record in KELLAM I. (C.T. 582)

Since KELLAM I was set for jury trial in the spring of 1975, the KELLAMS served Trustee LOUKAS on March 18, 1975, a subpoena to come and testify about his actions in the PFEIFER foreclosure of the KELLAMS' Third Trust Deed. At the same time, the KELLAMS served the KEEPER OF THE RECORDS (KEEPER) for Security Title, then and now SAFECO, to appear with all the books and records relating to the sale. (C.T. 879) The KELLAMS put the Trustee LOUKAS, and the KEEPER, on telephone notice to come and testify March 20, 1975. The case was continued to May 12, 1975, and KELLAMS telephonically continued the telephone notice to LOUKAS and the KEEPER to come to court and testify on May 12, 1975. (KELLAM I C.T. 129) The strain

was too severe for Trustee LOUKAS and relating to SAFECO that he could no longer bear the strain of exposure, on April 22, 1975, he gave a full and complete confession of details of his embezzlement of the KELLAMS' realty, in concert with PFEIFERS, SPATES and SULLIVANS, with the use of a SAFECO check representing embezzled funds of $1,000.00 to acquire the KELLAMS' Third Note and Trust Deed, from the beneficiary, in a manner constituting theft. (C.T. 478, 479, 852, 353, 854)

On April 22, 1975, was the time when Trustee LOUKAS confessed to SAFECO of the details of his theft by embezzlement of the KELLAMS' realty, in concert with the PFEIFERS. SAFECO knew also that the KELLAMS were suing PFEIFERS, together with DOE defendants, about the KELLAMS' foreclosure wherein Trustee LOUKAS was the Foreclosure Officer; because LOUKAS was subpoenaed as a witness, and his superior, Mr. Brummet, was served as the Keeper of the Records, and each were on the KELLAMS' telephone notice to give their testimony just two weeks later on May 12, 1975; and the duces tecum identified the foreclosure. (C.T. 879) (KELLAM I C.T. 129) The confession of the theft by embezzlement of the KELLAMS' realty, its attendant audit and investigation by LOUKAS, SAFECO and SAFECO BONDING COMPANY (C.T. 478, 479, 786, 849) of all of his embezzlements in the sum of $85,000.00, included an examination of the file in KELLAM I, in which they had been subpoenaed to testify were never disclosed in detail to the KELLAMS and file TS 9476 has always been concealed by SAFECO as late as the date of Lord's deposition.

SAFECO knew the Trustee LOUKAS had confessed to the taking of the KELLAMS' realty in concert with PFEIFERS in a manner constituting theft, was well within the classic definition of the offense contained

in the Third Cause hereinafter; if the reasonable construction upon the word "defendants" included fictitiously named Trustee LOUKAS as DOE I. Because when the acts and representations incorporated by reference by the Cause of Action are so incorporated, the Third Cause then to SAFECO read:

1.

"Plaintiff incorporates the allegations of Paragraphs 1 through 24 of FIRST CAUSE, in this THIRD CAUSE, as if set forth in their entirety.

2.

That defendants, including DOE I, Trustee LOUKAS, have wrongfully disparaged plaintiff's title in that they, including DOE I, Trustee LOUKAS, willfully and unlawfully and maliciously, and with an intention to permanently deprive plaintiffs of their property, and in the furtherance of their plan, did those acts and made those representations with knowledge of their falsity and an intention to deceive the trustee and plaintiffs. Those acts and representations were, incorporated by reference as follows: (KELLAM I C.T. 17-23)

Defendants, including DOE I, Trustee LOUKAS, were engaged in the business of acquiring distressed property through the purchase of junior encumbrances at a fraction of their value, and acquiring property, or tremendous profit on their investment. (KELLAM I C.T. 2⅛-12)

Defendants, including DOE I, Trustee LOUKAS, agreed to act together as agents, servants and employees of each other, and to

act together with the express and implied consent of each other at all times mentioned. (KELLAM I C.T. 18/18-23)

Defendants, including DOE I, Trustee LOUKAS, learned that the KELLAMS' Third Note and Trust Deed were long in default. (KELLAM I C.T. 21/20-21)

Defendants, including DOE I, Trustee LOUKAS, purchased the KELLAMS' Third Note and Trust Deed for $1,800.00, when the property had an approximate equity value of $260,000.00. (KELLAM I C.T. 21/20-1)

Defendants, including DOE I, Trustee LOUKAS, knowingly misrepresented to SECURITY TITLE INSURANCE COMPANY (SAFECO's predecessor, hereafter SAFECO) (KELLAM I C.T. 20) that the KELLAMS' Third Note and Trust Deed were lawful and proper and in default when, in truth and fact, it was unlawful. (KELLAM I C.T. 21/24 to 22/9)

SAFECO reasonably relied upon the fraudulent misrepresentations of defendants, including their DOE I, Trustee LOUKAS, and proceeded under Section 2924 of the Civil Code. (KELLAM I C.T. 22/7-9)

Defendants, including DOE I, Trustee LOUKAS, ignored the KELLAMS' notice of illegal demand, and other illegalities (KELLAM I C.T. 22/22-28; 23/1-2) and would not accept one penny less than the demand. (KELLAM I C.T. 20/8-12)

SAFECO conducted trustee's sale and upon the signal of Trustee LOUKAS, conducted the

bidding. Trustee LOUKAS bid on behalf of defendants, including DOE I, Trustee LOUKAS. SAFECO sold the KELLAMS' realty to defendants, including Trustee LOUKAS.

SAFECO executed, on December 20, 1973, a Trustee's Deed to the KELLAMS' realty, recorded that Trustee's Deed on December 26, 1973, and on the same day, delivered that Trustee's Deed to defendants, including DOE I, Trustee LOUKAS, a copy of which is Exhibit B. Said deed is upon the face, apparently valid; when, in fact, it is void. (KELLAM I C.T. 19/19-27)

Defendants, including DOE I, Trustee LOUKAS, willfully and unlawfully and maliciously, and with intention to permanently deprive the KELLAMS of their realty, and in furtherance of their plan, represented to the Riverside Municipal Court that they were the owners, presenting their void deed that the reasonable rental valued was $18.22 per day, knowing the same to be a false statement of opinion, in a fraud upon the Court, and to invoke the power of the Court to effectuate their wrongful intention. (As in Spencer v. Harmon Enterprises 234 C.A. 2nd 614) (KELLAM I C.T. 24/3-14, parenthesis added).

SAFECO knew by the Amended Complaint, that as soon as the KELLAMS were alerted that LOUKAS and SAFECO had, in fact, taken their realty in a manner constituting theft, and that the fictitiously named JOHN DOE I was not included in the word "defendants"—the pleading would be amended to name LOUKAS and SAFECO as one of the "defendants" in the Third Cause of Action aforesaid. Which alleged the theft of the realty by embezzlement of the title by sham and kangaroo

non-judicial foreclosure proceeding and abuse of inferior court unlawful detainer proceedings.

SAFECO, on April 22, 1975, did not honor any fiduciary duties to the KELLAMS arising one year and ten months before, but rather joined Trustee LOUKAS, PFEIFERS, SPATES and SULLIVANS and maintained the clandestine stance of a thief ever after. Thirteen years of continuing purposeful concealment.

SAFECO with full knowledge as of April 22, 1975, that Trustee LOUKAS, and SAFECO itself, were guilty of felonious theft by embezzlement of the KELLAMS' realty, one year and ten months before and after an audit by LOUKAS of his embezzlement of the KELLAMS' realty concealed from the KELLAMS, and from the police—SAFECO reported LOUKAS' crimes of embezzlement to police and prepared and submitted a false instrument, in writing, which purported to police to be an audit of the SAFECO checks, used by LOUKAS to embezzle funds from SAFECO, and realty and money in the alternative from the public, which instrument intentionally excluded the $1,000.00 check used by LOUKAS to acquire the KELLAMS' Third Note and Trust Deed in a manner constituting theft; and it excluded a $3,000.00 cash receipt to PFEIFER. SAFECO, in doing so, violated Section 496 and 1344 of the Penal Code of California in addition to Section 484, each felonious and also became an aider and abettor of LOUKAS and PFEIFERS, civilly—as well as their fellow civil conspirator. (C.T. 479, 853, 854)

The KELLAMS, Appellants, on August 25, 1975, after they were removed from the realty, were all rendered insolvent by the wrongful taking of their realty. EDNA was seventy-five years old, widowed, retired, and her income was social security, and

her home was taken, and Respondents' wrongful unlawful detainer judgment of $4,500.00 was entered against her, and she had no other property or savings. JAMES and KATHRYN had two sons whose ages were ten and eleven to provide for, and their home was also taken, and they had no other property or savings. JAMES was a sole practitioner at law, without an office, and resultant diminished practice. KATHRYN was a part-time elementary school secretary, and the family lived on her income, together with the assistance of other members of their respective families. They had no money or property with which to engage the services of attorneys, and attempts to do so were fruitless. They had no funds with which to engage the services of investigators and if investigation was to be done at all, it would have to be done by JAMES. Who, on August 25, 1975, suffered a heart attack and was confined in Kaiser Hospital, Fontana, California, and on August 28, 1975, was ordered not to do trial work for thirty days. (C.T. 855, 856)

Five months after SAFECO's false police report, on September 25, 1975, the KELLAMS learned, entirely by accident, two facts (1) that LOUKAS had been indicted, and (2) the indictment was for embezzlement of $85,000.00 over the years from SAFECO. On that day, the KELLAMS again attempted service of subpoenas on LOUKAS and the KEEPER for jury trial, at SAFECO's place of business, and they were so told by SAFECO. (C.T. 479, 855, 856)

The KELLAMS reported these two facts to their attorney, Dale C. Miller of the city of Riverside, who had agreed to represent the KELLAMS on August 25, 1975, who, on September 26, 1975, diligently embellished the same reported to the Court that

PFEIFERS was associated with LOUKAS, and LOUKAS was indicted for property transactions, including, we believe, the property in question, and we would like time to investigate the allegations of those criminals activities.

Hearing the KELLAMS' report, PFEIFERS, in open court, denounced the report—and purposefully concealed their relationship with LOUKAS and falsely reported to the Court that their relationship with LOUKAS was Trustee to Beneficiary, only, and that they were no more related to LOUKAS then the KELLAMS. (C.T. 857)

On Monday, September 29, 1975, the KELLAMS made inquiry of Trustee SAFECO in their Santa Ana Office as to whether Trustee LOUKAS' embezzlements were related in any manner to the KELLAMS' foreclosure. Trustee SAFECO purposefully concealed Trustee LOUKAS' embezzlement of the KELLAMS' realty by telling the KELLAMS that Trustee LOUKAS' embezzlements had nothing to do with the KELLAMS' foreclosure. (C.T. 858, 859)

Thereafter, the KELLAMS sought and interviewed their Trustee and friend, LOUKAS, about their foreclosure. Trustee LOUKAS purposefully concealed his interest in the realty and represented to the KELLAMS that the embezzlements had nothing to do with the KELLAMS' foreclosure. (C.T. 862)

On Tuesday, September 30, 1975, Trustee SAFECO purposefully concealed Trustee LOUKAS' embezzlement of the KELLAMS' realty. In response to the KELLAMS' Subpoena Duces Tecum, Trustee SAFECO presented a laundered and sham file. (C.T. 859, 860, 861)

The KELLAMS already had their complaint filed in Kellam I; they examined it and in the Third Cause of Action, it charged the PFEIFERS and other "defendants" with the taking of the property with an intention to permanently deprive the KELLAMS of their realty in a manner constituting theft by embezzlement if one of those "defendants" was the Trustee of the Realty, as hereinbefore set forth. That complaint was KELLAM I; PFEIFERS had claimed no defect in the pleading, and it was set for jury trial on December 22, 1975.

The KELLAMS still had faith in Trustee LOUKAS and believed in his integrity—while SAFECO knew he had embezzled the KELLAMS' realty. Since the case was set for trial on December 22, 1975, and out of an abundance of caution that Trustee LOUKAS and Trustee SAFECO might possibly be in bed with PFEIFERS, the KELLAMS served on December 16, 1975, the summons and complaint on Trustee LOUKAS, DOE I, as one of those "defendants" in the Third Cause of Action, together with a subpoena to testify as a witness. And served Trustee SAFECO on December 19, 1975, with summons and complaint as White Corporation. (C.T. 863) SAFECO knew Trustee LOUKAS was served. (R.T. 12)

The KELLAMS reasonably believed they were correct, that Trustee LOUKAS, fictitiously named and served as defendant DOE I, was included within the word "defendants" of their Third Cause of Action alleging the joint tortious taking of their realty as hereinbefore set forth.

However, the KELLAMS were wrong, they were mistaken in that their Third Cause of Action aforesaid suffered a fatal infirmity. The word "defendants" collectively used to include all those

defendants acting in concert in the acquisition and non-judicial foreclosure of the KELLAMS' Third Note and Deed of Trust in a manner constituting theft—did not include faithless fiduciary Trustee of the realty LOUKAS, fictitiously named and served as defendant DOE I.

The trial court in KELLAM I ruled that Trustee LOUKAS, named and served as DOE I, was not included in the word "defendants" in the Third Cause of Action as aforesaid, and that the parameter of the facts pleaded was usury only. The KELLAMS declined to amend their Third Cause of Action, together with Trustee LOUKAS, out of their complaint. The Trial Court granted judgment on the pleadings, and the KELLAMS appealed. In that appeal in KELLAM I, the Court of Appeal held that Trustee LOUKAS was not included as one of those "defendants" in the Third Cause of Action. And, necessarily, without the trustee acting in concert with the PFEIFERS, the Third Cause of Action did not state a cause of action against anyone. (C.T. 640, 648, 649) And, that the Unlawful Detainer judgment appendix E was res judicata as to allegations of 2924 violations and fraud in the validity of the Trustee's Deed. (See Appendix C, page 52.)

SAFECO, on the other hand, knew the KELLAMS were mistaken, they knew Trustee LOUKAS had taken the KELLAMS' realty in a manner constituting theft by embezzlement because he had so confessed to them nine months before that. (C.T. 352, 853) SAFECO had concealed those facts from the police and the KELLAMS, as aforesaid, and after learning of LOUKAS' arrest, the KELLAMS had made every inquiry of SAFECO relating solely to Trustee LOUKAS. SAFECO, of course, knew that no one else had been involved in the KELLAMS'

foreclosure. SAFECO also knew that the only cause of action the Third Cause of Action directed to SAFECO contained the classical definition of theft, to wit, maliciously, and with an intention to permanently deprive the KELLAMS' of their property—where any one of their employees, particularly Trustee LOUKAS, could have been included in the word "defendants." SAFECO also knew that Trustee LOUKAS had been served as Defendant DOE I. (R.T. 12, line 10)

Armed with this knowledge that plaintiffs were relying upon their Third Cause of Action to establish the liability against Trustee LOUKAS and vicariously SAFECO—SAFECO with an intention to make a dilatory motion for judgment on the pleadings at the outset of trial, to gain time until the ever rising statute of limitations would rise to protect them—did the following acts to divert the KELLAMS' attention away from such a motion and the statute of limitations:

(1) Intentionally determined not to demur, so that the issue might be raised and decided. (C.T. 863, 864, 865)

(2) Intentionally determined not to bring a timely motion for judgment upon the pleadings so that the issue might be raised and decided. (C.T. 865, 866)

(3) Intentionally filed a sham answer, which did not raise the affirmative defense that the complaint failed to state a cause of action. The answer failed to mention that SAFECO intended to make a motion for judgment upon the pleadings at the outset of trial upon the ground that their employee, Trustee LOUKAS, was not one of those "defendants" of the Third Cause of Action and, therefore, the complaint

failed to state a cause of action against SAFECO. (C.T. 866) SAFECO purposefully concealed its secret intention for more than three years and eight months after its sham answer.

On May 10, 1976, the new attorneys for SAFECO promptly read the file and concluded that a motion for judgment upon the pleadings should be made. (KELLAM I C.T. 521, 523, Par. 8) At that moment, SAFECO had a duty to plead it plainly and promptly. (Bollinger v. National Fire Insurance Co., 25 C.2d 399, 405, 406)

(1) The new attorneys intentionally determined not to remove the sham answer by amendment.

(2) The new attorneys intentionally determined not to bring a timely motion for judgment upon the pleadings.

The new attorneys gave no notice of their secret intention to bring a motion for judgment on the pleadings and purposefully concealed that intention until more than three years and two months thereafter, on July 23, 1979. (C.T. 906) The sham answer filed in this case was interposed for no other purpose than to lull the plaintiffs into a false sense of security until the statute of limitations would rise up and prevent suit. SAFECO knew of Trustee LOUKAS' activities long before the plaintiffs, and also knew that the plaintiffs were setting up and trying to enforce a claim against SAFECO because of Trustee LOUKAS' conduct from the complaint, which was served upon them.

Plaintiffs relied on that sham answer and believed that the case was at issue and would be

tried upon the merits. Until, on July 20, 1975, SAFECO quietly went in ex-parte to dismiss Trustee LOUKAS, because though served, return of service had not been filed with the Court. That action alerted the KELLAMS that SAFECO secretly intended to bring a motion for judgment upon the pleadings, claiming they knew nothing of this new party and his conduct, which they in fact did do. KELLAM II was forthwith filed to hold Trustee LOUKAS in together with all defendants, demonstrating that the KELLAMS had, in fact, relied upon the sham answers, dilatorily filed to divert their attention away from the statute of limitations. (C.T. 480, 915) If those sham actions by SAFECO were not done, there never would have been a KELLAM II.

KELLAM II was delayed by the pendency of KELLAM I by order of Court. With the conclusion of the appeal in KELLAM I, KELLAM II was forthwith moved forward. A second amended complaint was filed December 21, 1982. (C.T. 458-554) The complaint therein had several redundancies by the repetitive pleading of an agreement to do an overt act and thereafter in the pleading the doing of the overt act. Some of the acts were also out of time sequence. At hearings upon the demurrer, diverse new overt acts were presented to the court for use in the further pleadings of overt acts by the way of amendment. For the convenience of this Court, Appendix II, of the Appellants' Opening Brief, was prepared with citations to the record of each of the aforesaid facts contained therein. It is a compilation of the facts presented in the second amended complaint together with the new facts offered to the Court to be pleaded by way of amendment. They are reorganized by paragraph number, but each fact contained therein is cited to the record.

The facts alleged and presented to the Court for amendment present the commission of crimes involving theft, and concealment and withholding of property obtained in a manner constituting theft as well as the corresponding torts pleaded and available to be pled in Second Amended Complaint. The fact that the realty in KELLAM II was taken in a manner constituting theft affects the nature of the ownership as well as the statute of limitation. Appendix I, of Appellants' Opening Brief, was prepared to show that the facts pleaded and offered to be pled alleging the taking of the KELLAMS' realty as the taking of property in a manner constituting theft.

SAFECO and the other defendants, demurred to the Second Amended Complaint, urging the bar of the statute of limitations as to the KELLAMS' claims, when in the trial court, in KELLAM I, they had stated to the Court and in open Court and upon the record, that they would try KELLAM II upon its merits, but that the judge in KELLAM I should grant the dilatory motion for judgment on the pleadings.

The trial court, in KELLAM II, sustained the demurrer upon the ground that the statute of limitations had expired prior to the filing of the original complaint on July 27, 1979, and that the allegations in Paragraph 34 were not overt acts to further the conspiracy as alleged in Paragraph 21, and thereby extend the commencement of the running of the statute of limitations to a date after July 29, 1976. And, that Plaintiffs would be unable to further amend: (1) to state facts sufficient against SAFECO, or (2) facts sufficient to estop SAFECO, or (3) facts sufficient to constitute a waiver by SAFECO. (C.T. 790-794).

APPELLATE PROCEEDINGS

After a motion to reconsider was denied, KELLAMS appealed. The appeal was briefed, argued and submitted. An unpublished Opinion filed May 15, 1987, affirmed the sustaining of the demurrer without leave against the KELLAMS—upon entirely different grounds from the Court below.

In doing so, it created the substantial federal questions presented in this case as follows: The Municipal Court, Riverside Judicial District, County of Riverside, State of California, in Unlawful Detainer Proceedings, based upon the fraudulent trustee's deed aforesaid, acted beyond its monitary jurisdiction, and declined to hear any evidence upon the issue of fraud in the Trustee's Sale and Trustee's Deed, presented to that Court, and rendered Judgment evicting the KELLAMS (Appendix E, p. 74-F, p. 76). The KELLAMS thereafter brought KELLAM I, for equitable relief from that judgment as beyond its monitary jurisdiction, alleging also a Third Cause of Action for fraud in the Trustee's Deed and to cancel the same. Setting forth the conduct of the Court at hearing of the Unlawful Detainer Proceeding, there being no court reporter in attendance. (Appendix D, p. 66)

Preventing an evidentiary hearing of any kind upon the issue of Fraud in the Trustee's Deed, the Trial Court in KELLAM I, granted substantive judgment upon the pleadings, a non-statutory proceeding in California (Appendix K, p. 99).

In KELLAM I, the Court of Appeal of California affirmed the Trial Court holding that the judgment in the Unlawful Detainer Proceeding was res judicata as to the validity of the Trustee's Deed, as

to conformity with Section 2924 of the Civil Code of California (Appendix G, p. 78) and Fraud in the Trustee's Deed. (Appendix C, p. 27, 52-55)

KELLAM II, also alleging fraud in the Trustee's Deed, had been filed prior to the judgment on the pleadings in KELLAM I. It was filed in response to a procedural dismissal of Trustee LOUKAS, which was not upon the merits, and the statute of limitations had not yet run, for the purpose of holding Trustee LOUKAS in the action. The trial of KELLAM II was stayed pending the Appeal in KELLAM I.

The Trial Court in KELLAM II, sustained a demurrer without leave to amend upon an untenable ground that the statute of limitations was a bar to the action (Appendix B, p. 24).

The Court of Appeal of California affirmed as aforesaid upon entirely different grounds and raised the substantial federal question. The Court held that the Unlawful Detainer Judgment was Res Judicata on the question of fraud in the Trustee's Deed contained in KELLAM I, and that, in turn, became the Law of the Case in Kellam II as to the question of Fraud in the Trustee's Deed (Appendix A, p. 1, 20).

The court complained of, also held that the Trustee under a California Trust Deed owes no fiduciary duties of any kind to the Trustor, and approved of the conduct of SAFECO in the taking of the title to the KELLAMS' realty in concert with others, and that such conduct did not amount to Fraud of SAFECO (Appendix A, p. 12-19).

The KELLAMS raised the herein Federal Due Process denials by a Petition for Rehearing in the Court of Appeal of California, which was

summarily denied "Petition for Rehearing Denied" (Appendix H, p. 95) and also by Petition for Review in the Supreme Court of California, which was summarily denied "Petition for Review Denied" (Appendix I, p. 96).

SUBSTANTIALITY OF FEDERAL QUESTIONS

I

People are losing their homes, because they believe that they have placed their homes in the hands of a Trustee, with the highest fidelity, under a California Trust Deed, as security for the performance of repayment of a loan. When, in truth and fact, the Legislature and the Courts of California have so far chiseled away the duties of the "Trustee" to the Trustor, as to permit the Trustee under a California Trust Deed to take title to realty by non-judicial foreclosure proceedings under the provisions of Section 2924 of the California Civil Code (Appendix G, p. 78), summarily remove the homeowners within the provisions of Section 1161a California Code of Civil Procedure (Appendix F, p. 76) and package and dispose of the homes for the use and benefit of the Trustee and those to whom he has brokered an "Investment in Foreclosure." Such conduct, if perpetrated by a Trustee, would, of course, constitute embezzlement.

Homeowners, and in the instant case, the KELLAMS, have thusly been deprived of their homes by statutes which on their face, and operationally deprive them of due process of law within the 5th and 14th Amendments to the Constitution of the United States. Garfinkle v. Wells Fargo Bank (1973) 483 Federal Reporter 2nd 1074.

II

Due process requires that there be an opportunity to present every available defense." American Surety Co. v. Baldwin, supra, page 168; Lindsey v. Normet, supra, page 65.

Summary proceedings for possession of realty are permissible only where the state provides subsequent action for fraud in the title. Lindsey v. Normet, supra, Grant Timber & Mfg. Co. v. Gray, supra, and Bianchi v. Morales, supra.

CONCLUSION

For the reasons stated above, appellant submits that this appeal brings before the Court substantial and important due process federal questions, which require pleanary consideration, with briefs on the merits and oral argument, for their resolution, and that the herin considerations should not be permitted to go unchecked.

RESPECTFULLY SUBMITTED,

RICHARD MICHAEL CANTILLON
Attorney for Appellants

NOT FOR PUBLICATION

APPENDIX A KELLAM II

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

FILED
May 15 1987

STATE OF CALIFORNIA

EDNA S. KELLAM, et al. Plaintiffs and Appellants, et al. v. JAMES P. PFEIFER, et al. Defendants and Respondents.	E001226 (Super. Ct. No. 132412) O P I N I O N

APPEAL from the Superior Court of Riverside County. Robert J. Timlin, Judge. Affirmed.

Richard Michael Cantillon and James Kellam for Plaintiff and Appellant.

Fred Crane and Michael Hesse for Defendants and Respondents James and Shirley Pfeifer.

Best, Best and Krieger, William De Wolfe for Defendant and Respondent Safeco

Title Insurance Company.

Plaintiffs appeal from a judgment of dismissal entered after demurrers by defendant Safeco Title Insurance Company and James and Shirley Pfeifer to plaintiffs' second amended complaint were sustained without leave to amend.

FACTUAL BACKGROUND

The allegations of the complaint reveal the following. James Kellam, a Riverside attorney, and his wife and mother are the plaintiffs in this action. They owned twenty-six acres of land in Riverside, which contained a naval orange orchard, four dwellings and a barn, and had been in the family since 1904. The property was "heavily" encumbered, with both first and second notes and companion trust deeds, each with principals of approximately $25,000. The Kellams sought out the help of a family friend, Doctor Cecil Lord, to become a surety on a note executed by plaintiffs in favor of Crocker Bank. That note was for $4,500. Doctor Lord pledged a savings

account, containing $4,500. Plaintiffs, in turn, executed a note and third trust deed in favor of Doctor Lord, securing the $4,500 guarantee made by Doctor Lord to the bank. Plaintiffs defaulted on the Crocker Bank note in an unknown amount, and the bank applied Doctor Lord's pledged savings account to the default. The note in favor of Doctor Lord was due and payable in full on February 17, 1972.

Enter now Chris Loukas, the supervisor of Safeco Title's trustee section, the trustee on all the Kellam trust deeds. Loukas, "of course," knew plaintiffs were in default on the Lord note and trust deed and also knew that plaintiffs had been in default nearly continuously for several preceding years on the second note and trust deed. A year and a half had gone by, and still Doctor Lord made no move to collect on his note. Loukas purchased Doctor Lord's beneficial interest (the third trust deed) for $1,000, embezzled from Safeco (Loukas was later criminally prosecuted), and turned around and resold it

to the Pfeifers, evidently neighbors of the Kellams, for $1,800. This transaction appears only as an assignment of the trust deed by Cecil Lord to the Pfeifers, dated July 24, 1973. Plaintiffs did not learn of Loukas's involvement until at minimum, two years later, September 26, 1975.) Less than a week after the assignment to Loukas the Pfeifers, they signed and sent plaintiffs a notice of default and election to sell under the trust deed.

A trustee's sale was held in December 1974, and the Pfeifers bought the property. The Pfeifers then brought an unlawful detainer action against the Kellams, who answered, alleging, (1) that the third note and trust deed were usurious and illegal, (2) denied that the Pfeifers were assignees of Lord's beneficial interest under the third note and trust deed, (3) denied that Safeco had conducted the trust deed sale in conformity with Civil Code Section 2924, (4) alleged that the Pfeifers were not bona fide purchasers of the property, (5) denied that the Pfeifers were owners of the property, and (6) objected to

the jurisdiction of the court. The unlawful detainer action was decided adversely to the Kellams, who gave notice of but then abandoned an appeal from that judgment. Approximately a week later (August 23, 1974), the plaintiffs filed an action in the superior court for cancellation of void instruments, quiet title, slander of title, and equitable relief from the unlawful detainer judgment. (Kellam I). Loukas and Safeco were served in this action in December 1975. However, in 1979, Loukas was dismissed as a defendant for failure to return service within three years. (According to appellants' brief on this appeal, this second action, #E001226, was filed, within weeks, expressly to "hold" Loukas in as a defendant.) Kellam I was successfully demurred to by all defendants, among whom were later grantees and developers of the Kellams' property, and judgments of dismissal were entered. That judgment was affirmed by our decision of May 17, 1982 (4 Civ. 21945, Riverside Superior Court No. 109876).

This brings us to this, the second action (Kellam II), and the second amended complaint. It alleges seven causes of action, which we examine in detail in the ensuing discussion. They are: (1) conspiracy and slander of title, (2) cancellation of void deed, (3) in the alternative, cancellation of voidable deed, (4) equitable relief from judgment (unlawful detainer action), (5) equitable relief from judgment (unlawful detainer action), (6) constructive trust, (7) indemnity. Safeco demurred on three general grounds: (1) failure to state a cause of action, (2) res judicata, and (3) statute of limitations, as well as the special ground of another action pending. The Pfeifers also demurred generally, on the same grounds. As to Safeco, the ruling noted that the first, second and third counts foundered on the statute of limitations, while the fourth, fifth and sixth counts failed on statute of limitations grounds as well as failure to allege causes of action. The seventh

count was held to be faulty in failing to allege a cause of action. As to the Pfeifers, counts one through six were ruled defective on statute of limitations grounds only. The seventh was defective in failing to allege a cause of action.

DISCUSSION

As a preliminary matter, we note that plaintiffs object, on appeal, to judicial notice taken by the trial court of the record in Kellam I, and our opinion on appeal in that same action. Plaintiffs' objections are to the procedure used in invoking judicial notice, and the documents actually noticed.

As to the procedure followed, there were not defects. Both Safeco and the Pfeifers requested judicial notice of the entire action, judicially noticed in that file (but the file from the unlawful detainer action is not in the record). This request was made by a noticed motion coupled with each defendant's demurrer. (See Code of Civ.

Procedure, Section 430.70, making it mandatory that the demurrers specify matter to be judicially noticed upon which the demurrer relies.) At the hearing on the demurrer, no objections were raised. Evidence Code Section 455 provides in regard to optionally noticeable matter "of substantial consequence" to the action,"...the court shall afford each party reasonable opportunity... to present to the court information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed." The Law Revision Commission Comments to this section state: "[w]hat constitutes a 'reasonable' opportunity to 'present...information' will depend upon the complexity of the matter and its importance to the case." The noticed motion constituted a "reasonable opportunity," and, had plaintiffs had wished defendants to define the rather open-ended request (e.g., to exclude inadmissible hearsay, for instance, see People v. Rubio (1977) 71 Cal. App. 3d 757, 765, overruled on another point by People v. Freeman (1978) 22 Cal. 3d 434, 438), they

could have objected. They did not. In any event, the procedure followed was proper.

We turn now to the documents noticed. The trial court noted in its ruling, (1) that it had relied upon our opinion on appeal in Kellam I, and (2) a statement by plaintiffs' counsel on the record in Kellam I. First, the demurrer could properly be based on judicially noticeable matter as well as the complaint. (Code Civ. Proc., Section 430.30.) As to the opinion, records of court may be judicially noticed under Evidence Code Section 452, subdivision (d). Notice is not limited to the existence of the opinion, or issues raised, but extends also to facts stated in the appellate opinion. (Weiner v. Mitchell, Silberberg and Knupp (1980) 114 Cal. App. 3d 39, 46.) Therefore, the opinion was properly noticed.

We turn now to the September 26, 1975 remarked by plaintiffs' counsel noting that they Kellams had discovered Chris Loukas's connection with the Pfeifers as well as the

indictment of Loukas for criminal property transactions (embezzlement from Safeco) just the day before. While the attorney's statement was not testimony under oath, as an officer of the court he was under a mandatory duty to give no false statements of fact or law to the court. (Rules of Professional Conduct 7-105; Chefsky v. State Bar (1984) 36 Cal. 3d 116, 124 (modified by 206 Cal. Rptr. 859, 687 P. 2d 1165). As such, the statement was sufficiently akin to testimony to be part of the evidentiary record. Although the statements were possibly hearsay ("Mr. Kellam told me that he found out that..."), they are clearly admissible as admissions of a party opponent (defendants "moved" the statements into evidence.) (Evid. Code, Section 1222, subd. (a).) Therefore, the statements by plaintiffs' attorney were property noticeable as a part of the court's record, and do not run afoul of the rule against inadmissible hearsay found in People v. Rubio, supra, 71 Cal. App. 3d at p. 765, and in Joslin v. H.A.S. Insurance Brokerage (1986) 184 Cal.

App. 3d 369, 374-375.)

I

THE FIRST CAUSE OF ACTION

CONSPIRACY AND SLANDER OF TITLE

The first cause of action is the heart of plaintiffs' lawsuit, occupying 22 pages of the 26-page complaint. Where demurrers are based on several general grounds, the ruling can be sustained if any of the general grounds urged are valid. (Weinstock v. Eissler (1964) 224 Cal. App. 2d 212, 224.) We hold that the first count fails to allege a cause of action against either Safeco or the Pfeifers, and therefore the sustaining of the demurrers was proper.

The elements of actionable slander of title are: (1) a publication of matter which is untrue and disparages another's interest in property, (2) reasonably impairing the property's vendibility in the eyes of a third party, (3) without privilege or justification and thus with malice, express or implied, (4) resulting in pecuniary damage.

Howard v. Schaniel (1980) 113 Cal. App. 3d 256, 262-264. From this definition, it is clear, if the the trustee's deed obtained by the Pfeifers was valid, that the foreclosure sale (itself adjudicated valid in Kellam I) deprived the plaintiffs of all interest in the property. If the plaintiffs have no interest in the property, there could be no actionable slander of title as to them. Therefore, we examine the plaintiffs' allegations concerning the Pfeifers' acquisition to determine if there was any actionable wrong in the transfer of Lord's interest to the Pfeifers.

Plaintiffs allege that the Pfeifers obtained Lord's beneficial interest through breaches of the fiduciary duty owed to them by Safeco's trust officer Loukas. These alleged breaches are two: (1) the sue of the "inside information" that the Kellams could not survive, in plaintiff's quaint phrasing, a "sudden and unyielding foreclosure" of the beneficial interest, and (2) the use of the money embezzled from Safeco

to acquire the beneficial interest upon which the foreclosure proceedings were quickly initiated.

We examine the nature of the duty owed, if any, by Loukas to the Kellams. It is an established proposition, although denominated a "trustee," that one holding title as a trustee on a deed of trust is not a "trustee" as defined in the law of trusts. (Baron v. Colonial Mortgage Service Co. (1980) 111 Cal. App. 3d 316, 323; Lupertino v. Carbahal (1973) 35 Cal. App. 3d 742, 747; Pacific S.& L. Co. v. N. American, etc. Co. (1940) 37 Cal. App. 2d 307, 309-310.)

If Loukas was not a trustee in the true legal sense of the term, the only other source of duty toward the Kellams would derive from the law of agency. A very early Supreme Court decision stated, in examing the liability of a trustee under a trust deed, that "[a] trustee under an ordinary deed of trust is the common agent of both parties and is required to act impartially. (Cook on Corporations, 7th ed. p. 3050; Jones on Mortgages, 6th ed.

sec. 1771.)" (Ainsa v. Mercantile Trust Co. (1917) 174 Cal. 504, 510.) This language, without being operative to any holding, is cited also in the three cases mentioned above. However, this view has been criticized: "[t]he function of the trustee is basically to conduct a sale or to reconvey the property to the trustor according to the beneficiary's instructions. It has no other duties. The trustee has been referred to as a common agent [e.g. of trustor and beneficiary] rather than a true trustee, but even this label is misleading, because the trustee is not required to obtain the consent of the trustor as a precondition to selling his interest. (Jones v. Sierra Verdugo Water Co. (1923) 63 Cal. App. 254, 218 P. 454.)" (CEB, California Mortgage and Deed of Trust Practice, Section 3.9, p. 83, emphasis added.)

Ainsa, which expressed the "common agent" theory, also contains the following:

"The trustee of an express trust derives his power from the instrument creating

that trust, and the same document furnishes the measure of his obligations. [Citation.] Applying the measure of these rules we find that the trustee was under no extraordinary duty. It was not an insurer of the title of the Mexican Company to the coal lands, nor was it bound to know the law of Mexico and to investigate the title in the light of the statutes of that republic. A trustee under a deed of trust does not assume the important obligations which are in some instances cast upon a trustee by operation of law. An ordinary trust deed is little more than a mortgage with power to convey. [Citations.] A trustee under an ordinary deed of trust is the common agent of both parties and is required to act impartially. [Citations.] Some authorities hold that he is not a trustee at all in a technical sense. [Citations.]" (Ainsa v. Mercantile Trust Co., supra, 174 Cal. 504, at p. 510, emphasis added.)

As the excerpt above shows, while holding in that case that the trustee was

a common agent of "both parties," the court in Ainsa also held that generally the duties of a trustee are defined by the trust deed itself. The paramount importance of this holding, with respect to a trustee's duties in connection with notice in nonjudicial foreclosures, is emphasized in I.E. Associates v. Safeco Title Ins. Co., which states "[t]he rights and powers of trustees in nonjudicial foreclosure proceedings have long been regarded as strictly limited and defined by the contract of the parties and the statutes." (I.E. Associates v. Safeco Title Ins. Co. (1985) 39 Cal. 3d 281, 287.)

The Ainsa common agent theory was mentioned in passing in that case, as well as in Garfinkle v. Superior Court, which held nonjudicial foreclosure was not subject to California due process requirements. (Garfinkle v. Superior Court (1978) 21 Cal. 3d 268, 283, fn. 22.) Neither Supreme Court Case, however, based any holding upon the common agent theory, or addressed the question of the continued viability of the theory, or,

finally, addressed the question of whether or not such an agency would be implied by law where the contract between the parties does not so provide.

In line with the approach of the high court to strictly construe and limit the duties of a trustee, (see I.E. Associates, supra, we look to the contract between the parties as the only source of agency duties other than statute.[1] (No statute creates the agency relationship between trustee and trustor alleged by plaintiffs, therefore we are left to examine the contract of the parties.) We examine the trust deed in this case (attached

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1. See also Scott v. Security Title Ins. & Guar. Co. (1937) 9 Cal. 2d 606, 614, in which the plaintiffs alleged a breach of duty by the trustee in failing to hold the sale before the property plummeted in value with the consequence that they were required to make up the sum lost by paying a deficiency judgment. After finding no fraud in the sale (pp. 611-612) the court examined the allegations concerning the agreement in the deed of trust, and held, after assuming for purposes of argument that an agency relationship between trustor and trustee existed, no facts were alleged disclosing a breach of a contract of agency. (P. 614) The implication of the court's analysis was that independent of the contractual agreement between trustor and trustee, no agency relationship existed. Therefore, no agency relationship would be implied in law.

to the complaint) to determine, if, as a matter of law, it could be said an agency relationship was created between the trustee (Loukas, Safeco) and the trustor (the Kellams.) We hold as a matter of law that no agency relationship was created. The deed states that it is an irrevocable grant by the trustors, the Kellams, to the trustee, for the benefit of Cecil Lord. On the back of the deed are a series of 14 covenants. The only covenants embodying agreement by the trustee are ones stating that the trustee accepts the trust, that the trustee can reconvey or sell the property without notice to or demand upon the trustor [plaintiffs]. Finally, the trust agreement gives to the beneficiary the unilateral right to replace the trustee.

From the foregoing, it is clear that the trustee is the agent of the beneficiary, for the purposes delineated in the trust agreement. It is equally clear that the agreement creates no principal-agent relationship between the trustor and trustee. The

agreement is between the trustor and the beneficiary, and the trustee is the agent of the beneficiary under that contract. Because no agency relationship is created, no fiduciary duty runs from trustee, Loukas, to trustor, plaintiffs. If no fiduciary duty was created, there could be no breach of the duty by conveying "confidences," or even account information which was contained in company records, to the Pfeifers.

We make a final observation. Loukas purchased Lord's interest for $1,000 and sold it to the Pfeifers for $1,800. If anything, Loukas breached the duty of loyalty owed to Lord, the beneficiary, to refrain from making a secret profit, at his, the principal's, expense. The Kellams simply have no standing to sue for the wrong to Doctor Lord. They were in default; it was just a question of who would foreclose, and the Kellams had no power under the trust agreement to block any assignment of the beneficial interest. Because the Kellams can state no actionable wrong in the acquisition

of the trust deed by the Pfeifers, they can state no cause of action for slander of title.

The second possible basis of a duty owed the Kellams by the trustee is the Trustee's duty to conduct the foreclosure sale fairly. (Scott v. Security Title Ins. & Guar. Co., Supra, 9 Cal. 2d 606, 611; Block v. Tobin (1975) 45 Cal. App. 3d 214, 221.) The validity of the sale, as distinguished from the validity of the acquisition of the trust deed, was adjudicated in favor of the defendants in Kellam I, and is the law of the case. (Wood v. Elling Corp. (1977) 20 Cal. 3d 353, 358.)

We turn now to the conspiracy allegations, which consist of wrongful acts both in the acquisition of title and use of the property after title was acquired. Plaintiffs misunderstand the nature of civil conspiracy. It is not a separate actionable tort, rather, "[a]s long as two or more persons agree to perform a wrongful act, the law places civil liability for the resulting damage on all of them, regardless of whether they actually

commit the tort themselves. [Citation.] 'The effect of charging...conspiratorial conduct is to implicate all...who agree to the plan to commit the wrong as well as those who actually carry it out. [Citations.]'" (Wyatt v. Union Mortgage Co. (1979) 24 Cal. 3d 773, 784.)

Therefore, in order to hold defendants on a conspiracy theory, there must have been commission of an actionable tort. We have seen that the plaintiffs can allege no actionable wrong in either the Pfeifers' acquisition of Lord's beneficial interest, or in the trustee's sale. Consequently, no actionable wrong occurred in the acquisition of title. Because the plaintiffs had no interest in the property after the sale, nothing done in connection with the property after the sale could wrong them. Therefore, no conspiracy could be alleged, and the entire first cause of action fails.

II

REMAINING CAUSES OF ACTION

Counts two through six all depend upon a wrongful acquisition of the beneficial

interest, therefore they fail also. Count seven only charges Safeco Bonding Company, therefore is demurrable as to these defendants.

Plaintiffs have had numerous opportunities to amend. It is plain they cannot state a cause of action; therefore there was no abuse of discretion in sustaining the demurrers without leave to amend.

We note that the trial court's ruling of September 22, 1983, sustaining the demurrer as to all seven counts. However, the judgment dismisses as to only counts one through six. This was clearly an oversight on the part of the trial court; accordingly we shall order the judgment modified.

DISPOSITION

The judgment is ordered modified to reflect a dimissal, as to all defendants here, of counts one through seven. Otherwise, the judgment is affirmed.

NOT FOR PUBLICATION

/s/ McDaniel
Acting P.J.

We concur:

/s/ Hews
J.

/s/ Haldorsen
J.*

*Retired Judge of the Superior Court under assignment by the Chairperson of the Judicial Council.

APPENDIX B KELLAM II

DEMURRER SUSTAINED WITHOUT LEAVE

FILED
Riverside County
Jun 11 1984

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE

EDNA S. KELLAM, KATHRYN L. KELLAM and JAMES L. KELLAM, Plaintiffs, vs. JAMES P. PFEIFER and SHIRLEY A. PFEIFER, et al., Defendants.	CASE NO: 132 412 JUDGMENT

The separate demurrers of Safeco Title Insurance Company ("Safeco") and James and Shirley Pfeifer ("Pfeifer") to plaintiffs' Second Amended Complaint came on for hearing before the Honorable Robert J. Timlin, Judge of the Superior Court of Riverside County in Department 13 of the above entitled court on June 3, 1983.

Dale C. Miller, Esq. and James L. Kellam, Esq. appeared for the plaintiffs,

William R. DeWolfe, Esq. of Best, Best & Kreiger appeared for defendant Safeco. Alan L. Green, Esq. of the law offices of Fred Crane, A Professional Corporation, appeared for defendants Pfeifer.

The Court read and considered the demurrers and opposing papers and all supplemental documents filed by the parties and heard oral argument. On September 22, 1983, the court issued ruling sustaining both demurrers without leave to amend.

Plaintiffs moved for reconsideration, and said motion came on for hearing on January 13, 1984, in Department 13, the Honorable Judge Robert J. Timlin, Presiding on January 19, 1984, the court granted reconsideration and affirmed its earlier ruling on the separate demurrers.

The court having found that plaintiffs' second amended complaint fails to state a cause of action against defendants Pfeifer and Safeco, and having further found that plaintiffs would be unable to amend said complaint to state a

cause of action against such defendants, it is hereby ordered that judgment be entered as follows:

Plaintiffs' Second Amended Complaint is hereby ordered dismissed with prejudice as to the First six causes of action of plaintiffs' Second Amended Complaint, as against defendants Safeco Title Insurance Company, and James P. Pfeifer and Shirley A. Pfeifer.

DATED: June 11, 1984

/s/
JUDGE OF THE SUPERIOR COURT

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

APPENDIX C KELLAM I

COURT OF APPEAL, FOURTH DISTRICT

SECOND DIVISION

FILED
May 18, 1982

STATE OF CALIFORNIA

EDNA S. KELLAM, et al.	4 Civil 21945
Plaintiffs and Appellants,	(Super. Ct. No. 109876)
vs.	O P I N I O N
JAMES P. PFEIFER, et al.	
Defendants and Respondents.	

APPEAL from the Superior Court of Riverside County. Ernest M. Lopez, Judge. Affirmed.

Dale C. Miller, for Plaintiffs and Appellants.

Best, Best & Krieger and William R. DeWolfe, for Defendants and Respondents Birth Development Company, Inc., and Safeco Title Insurance Company.

Fred Crane and Robert E. Boehmer, for Defendants and Respondents Pfeifer, Spates,

and Sullivan.

The appeal here is from a judgment on the pleadings after the trial court had concluded that plaintiffs' (first amended complaint, in four counts, failed to state a cause of action against any of several defendants. Plaintiffs had previously suffered a non-judicial foreclosure of a third deed of trust covering their 26 acres of orange groves, following which they had also been subjected to a judgment in an unlawful detainer action brought to gain possession of the lands foreclosed upon. The theory of plaintiff's action was that the trustee's deed on foreclosure was void and should be cancelled; the quiet title and other counts derived from that central, alleged grievance. However, plaintiffs' efforts to plead a viable cause on such a theory were ruled to have fallen short. In our view, the trial court correctly analyzed and properly decided the issues before it, and so the judgment will be affirmed.

RECITAL OF BACKGROUND FACTS

As disclosed by the allegations of

the amended complaint and other factual materials in the record, the following events led up to the filing of the initial complaint.

The plaintiffs are a Riverside attorney and two relatives. Many years ago, plaintiffs' predecessors had acquired the property in question, consisting of two non-contiguous parcels of five and twenty-one acres respectively. The lands were planted to naval orange trees and included residential buildings. As of 1974, after the foreclosure, the plaintiffs alleged that the property was worth $260,000. However, the record does not disclose the amount of the first and second trust deed emcumbrances, and so there is no indication of the extent of plaintiffs' equity at the time of foreclosure.

In any event, on January 6, 1972, the plaintiffs delivered to Dr. Cecil Lord their promissory note for $4,500, a short term obligation at 10 percent interest. This note was secured by a third trust deed on the 26 acres noted. Although not clearly set forth in the amended complaint, but as gleaned from

the record otherwise, the plaintiffs had tried unsuccessfully to borrow $4,500 from a bank. Dr. Lord them deposited with the bank $4,500 in a 6 1/2 percent savings account, the passbook for which was pledged to the bank as security for a $4,500 bank loan to the plaintiffs. The plaintiffs defaulted on the bank loan, and the bank then applied Dr. Lord's savings account in satisfaction of such defaulted loan. Thereafter, the plaintiffs did not repay Dr. Lord or even offer to do so.

Enter the defendants James and Shirley Pfeifer. They were alleged to have been engaged in the business of acquiring "distressed" property and that in this instance they purchased the plaintiffs' note and third deed of trust from Dr. Lord for $1,800, doing so long after the note was in default.

The defendant Security Title, now known as Safeco and sued and served as fictitious defendant, was substituted as trustees on the third deed of trust, and, at the instance of the Pfeifers, conducted a nonjudicial foreclosure. Thereupon, Safeco issued its

trustee's deed to the Pfeifers on December 20, 1973.

The following March an unlawful detainer proceeding was commenced by the Pfeifers in the Municipal Court, Riverside Judicial District, for the purpose of acquiring possession of the premises foreclosed upon. That case proceeded to judgment and a writ of possession was executed on August 20, 1974.

That galvanized the plaintiffs into action, and they filed their initial complaint three days later. In just another three days they filed their amended complaint for: (1) cancellation of void instruments; (2) quiet title; (3) slander of title; and (4) equitable relief from (the municipal court) judgment. Simultaneously with their filing of the amended complaint the plaintiffs applied for a temporary restraining order to prevent their eviction from the premises in question. The temporary restraining order was granted, but, upon hearing of the order to show cause, the trial court denied plaintiff's application for a preliminary injunction.

SUMMARY OF FURTHER PROCEEDINGS IN THE TRIAL COURT*

After the trial court had dissolved the temporary restrainig order and denied the plaintiffs' application for a preliminary injunction, the Pfeifers answered the amended complaint and filed an at-issue memorandum. The latter filing was on December 11, 1974, two months after the answer had been filed. On January 6, 1975, the matter was set for trial on March 20, 1975.

On March 14, 1975, the plaintiffs filed a motion to vacate the trial setting. The motion was denied without prejudice, but on the day assigned for trial it was continued on plaintiffs' motion to May 12, 1975, and on April 11, 1975, pretrial was ordered. At the pretrial, the trial date was confirmed and the court also ordered that plaintiffs would not be granted a continuance to obtain other counsel. However, on the new trial date, the trial was further continued to August 4, 1975. It trailed briefly, and

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*While tadious, it is necessary to set out in detail the procedural events leading up to the trial, for certain rulings of the trial court which denied eleventh hour efforts by plaintiffs to amend their complaint properly responded to what had gone on before.

plaintiffs them moved again for a continuance. That motion was denied, but shortly thereafter plaintiffs associated in new counsel, and his continuance motion was granted.

Just before the September 26, 1975, hearing on that continuance motion, plaintiffs moved to join Birth Development, Simpson, the Spates and Sullivans as defendants. The deeds attached to the motion reflected conveyance of a fractional one-half interest in some of the property to Simpson, Spates and Sullivans in March 1974, and conveyance of the five-acre parcel to Birth in July and September 1975. In conjunction with partially granting that motion, trial was continued to December 22, 1975.

Shortly before the December 22, 1975, trial date, plaintiffs served their August 26, 1974, amended complaint on Chris Loukas as Doe I.[1] At about the same time, Safeco Title Insurance (Safeco) was served with the August 26, 1974, amended complaint, "White Corporation." Safeco

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1. Loukas was later dismissed as a defendant by reason of plaintiffs' failure to file a return of service within three years as required by Section 581a of the Code of Civil Procedure.

answered promptly on January 28, 1976.

In the meanwhile, the trial had been continued again, this time to June 21, 1976. However, in March of 1976, plaintiffs obtained an order vacating that trial date.

In December 1976, plaintiffs took two depositions, and in early 1977 engaged in some ex parte applications apparently aimed at trying to default some of the newly served defendants,including Birth.

From mid-1977 to April 17, 1979, when they filed an at-issue memorandum, plaintiffs undertook no activity which appears in the record.

On May 1, 1979, plaintiffs filed and served their motion to have the case set for trial, citing the proximity of the bar of the five-year statute.

Safeco then requested that the trial setting motion be delayed until the plaintiffs brought any motion to amend that they might intend to bring, but the trial setting motion was granted on May 14, 1979, with the trial set for July 23, 1979.

Plaintiffs served and filed their notice

of the July 23 trial in mid-May, but brought no motion to amend until July 13, 1979, on time shortened to three days and just ten days before trial. That motion was denied at the July 16 hearing.

The July 23, 1979, trial date was sought basically by plaintiffs to avoid the bar of the five-year statute. On July 23, 1979, when the case was ultimately assigned to a trial department, plaintiffs' counsel announced that he had felt for some time the pleadings should be amended, and when proceedings actually commenced on July 31, plaintiffs filed a motion to amend. The amended pleadings offered sought to introduce new factual allegations based on new theories. The motion was opposed and denied. In an earlier motion, brought on shortened time on July 16, 1979 (one week before trial), plaintiffs had sought either to amend their 1974 amended complaint or to file the very same proposed second amended complaint. Those motions were opposed because they sought to introduce new facts, theories and issues just before trial. The department hearing those motions denied them.

The defendants them made their motions for judgment on the pleadings. Before ruling, the trial court gave plaintiffs leave to present a proposed amended complaint within the scope of the general set of facts as those alleged in the August 26, 1974, amended complaint, the one on which the case was brought to trial, and recessed the proceedings to give plaintiffs the opportunity to present such a pleading.

Several days later, plaintiffs presended two further proposed amendments. After hearings on those, the trial court denied the motions to amend principally because plaintiffs failed and refused to confine themselves to the general set of facts included in the 1974 amended complaint and because of the plaintiffs' unexcusable delay, to defendants' prejudice, in proposing the new matters.

Between July 23 and August 26, 1979, while the above proceedings were occurring, plaintiffs also filed an entirely separate superior court action (No. 132412), the complaint therein being the same as the attempted

second amended complaint which had been the subject of their unsuccessful July 16, 1979, motion in Department 10 and their unsuccessful July 31, 1979, motion in Department 7. Plaintiffs then moved in the assigned trial department to consolidate the new case with this case, and concurrently moved for a continuance of both cases. Those motions were also denied.

SYNOPSIS OF AMENDED COMPLAINT

The first count is labeled "For cancellation of void instruments." The key allegations recited that plaintiffs are the owners of the described premises and that "defendants (undifferentiated) possess a deed to the premises from SECURITY TITLE INSURANCE COMPANY which was executed and delivered to defendants on December 20, 1973...and is upon its face, apparently valid; when in fact it is void."

Plaintiffs then alleged "That the hereinbefore described Deed of defendants is void in that it was issued by SECURITY TITLE INSURANCE COMPANY, after a Trustees' Sale on December 14, 1973 at 10:30 a.m. wherein de-

fendants, through SECURITY TITLE INSURANCE COMPANY, their agents, were put on notice by plaintiffs that the sale was void in that the Trust Deed upon which it was based, was void, and illegal, in that among other things, it secured a debt which was usurious and the demand made for payment, or in the alternative sale, was void because it provided for usurious interest; and plaintiffs could not pay less than the demand because defendants would not accept one penny less, rendering tender fruitless."

Plaintiffs next alleged, "That the Trust Deed upon which the Trustees' Sale was conducted was usurious in that it secured a Note which provided for 10% interest which said Note and Trust Deed were conditioned upon the beneficiary depositing $4,500.00 in United California Bank, Main Branch, Riverside, California, in a Savings Account which United California Bank promised to pay the beneficiary under such Trust Deed approximately 6 1/2% for a total interest to beneficiary of 16 1/2%."

Plaintiffs next alleged, "That the

Trust Deed, upon which Trustee's Sale was conducted, was void for illegality, in that it provided for short-term, lump-sum payment of an obligation as a third lien upon real property contrary to public policy expressed in the Statutes of the State of California."

Plaintiffs next alleged, "That the Trust Deed, upon which Trustee's Sale was conducted, was void for illegality, in that it was a Junior Encumbrance without the consent of Federal Land Bank, beneficiary under the First Deed of Trust, and in derrogation of that security interest contrary to public policy and the Statutes of the United States."

Plaintiffs then alleged that defendants were not bona fide purchasers and that they negligently represented to the trustee that the note was lawful and proper and not in default. It was then alleged that as a direct and proximate result of this negligence plaintiffs had been injured in their quiet enjoyment and possession of the premises.

Similar allegations were tailored to an alleged innocent misrepresentation where a

reasonable investigations would have disclosed that the note was "unlawful," or in the alternative that such misrepresentations were made knowingly.

Plaintiffs next alleged, "That the Trustee, under said Trust Deed, reasonably relied upon the fraudulent (sic) misrepresentation of defendants, aforesaid, and proceeded with Trustee's Sale under the provisions of Section 2924 of the California Civil Code."

Plaintiffs next alleged, "That the deed upon which defendants have acted is further void in that all of those proceedings for notice and publication provided in Section 2994 of the California Civil Code were not complied with."

Finally, plaintiffs alleged, "Further in reasonable reliance upon defendant's fraudulent (sic) mispresentation said trustee conducted trustee's sale, acting in the capacity as trustee, conducting the bidding, and as agent for defendants herein, and purchased the described premises at said trustee's sale, there being no other persons present,

excepts (sic) plaintiffs who placed said trustee on notice of the illegality of the Note and Trust Deed upon the sale was being conducted, that it was lawful and the reasons therefor. Plaintiffs, on prior occasion, had given said trustee the same notice."

In the second count entitled "Quiet Title" the 24 paragraphs of the first count were incorporated by reference, and the standard conclusionary allegations of a garden variety quiet title action were set out.

The third count, likewise entitled "Quiet Title" also incorporated by reference the 24 paragraphs of the first count and then added "That defendants have wrongfully disparaged plaintiff's title in that they willfully and unlawfully and maliciously, and with an intention to permanently deprive plaintiffs of their property, did those acts and made those representations with knowledge of their falsity and an intention to deceive the trustee and plaintiffs."

Plaintiffs next alleged, "And with said mental state, and in furtherance of their

plan, represented to the Riverside Municipal Court that the reasonable rental value was $18.33 per day, knowing the same to be a false statement of opinion, in a fraud upon the court and to invoke the power of the court to effactuate their wrongful intentions."

Finally, plaintiffs alleged, "That plaintiffs have suffered pecuniary damages in the reasonable value of costs and legal services in the amount of $1,500.00 as a direct and proximate result of the conduct of defendants, and as a further proximate result of said acts propective (sic) purchasers of the described premises concluded not to purchase ten acres of the described premises to plaintiffs' damage in the amount of $60,000.00. As a direct and proximate result of said acts of defendants, plaintiffs have suffered damage in emotional distress in the sum of $150,000.00."

In the fourth count, entitled "Equitable Relief From Judgment," plaintiffs incorporated by reference the 24 paragraphs of the first count plus the paragraphs containing the charging allegations in both the

second and third counts. Thereupon, the plaintiffs laboriously recounted the events of the unlawful detainer proceeding in minute detail.

This recitation was followed by allegations, "That rapidly approaching subdivisions made the ascertainment of damages of this property extremely difficult to determine in that they are three-eights (sic) mile away from being contiguous, and the new Arlington High School is one-half mile away."

Plaintiffs next alleged, "That defendants, herein, intended to destroy the barn and apartment through the use of a bulldozer; said structures are unique and historic."

Plaintiffs next alleged, "That plaintiffs, herein, and their ancestors have resided on the premises since 1904, and accumulated tremendous quanities of personal property that cannot, and could not reasonably be removed since the time of judgment of the Municipal Court and to move the same and resituate them constitute economic waste and hardship."

Plaintiffs next alleged, "For all of

the herein stated reasons irrepairable (sic) injury will result to these plaintiffs, and each of them, unless this court acts."

Finally, plaintiffs alleged, "As to relative hardship, plaintiffs, herein, are informed and believe that defendants, herein, purchased their trust deed for the sum of $1,800.00, and any hardship which they may have suffered is arithmatically computable and miniscule."

In their prayer plaintiffs ask for an order cancelling the trustee's deed of December 20, 1974, for an order quieting title, for substantial money damages, and that the municipal court judgment in the unlawful detainer action "be found null and void... and that enforcement thereof be forever restrained."

DISCUSSION

In resolving the issues we must treat with two groups of defendants. One is Safeco who acted as the trustee in the nonjudicial foreclosure. The other group consists of all others, including first the Pfeifers and then

those claiming interests through them as grantees after the Pfeifers had received the trustee's deed from Safeco.

However,the kinds of issues as to each group are essentially the same. The first is whether the August 26, 1974, amended complaint states a cause of action against the defendant or defendants in question. The other is whether the trial court abused its discretion in any of the rulings made down the stretch at the time the case came on for trial.

Certain general observations with reference to the first issue apply across the board. Although not the subject of authorization by statue, a motion for judgment on the pleadings is nevertheless a well-established practice found in frequent use. It is also well settled that such motion fulfills precisely the same office as a general demurrer. As a consequence, a motion for judgment on the pleadings is confined solely to a consideration of the factual allegations contained in the pleading challenged. (Colberg, Inc. v. State of California, ex rel.

Dept. Pub. Wks., 67 Cal. 2d 408, 412.) Accordingly, in dealing with the first issue, we shall be concerned only with the content of the amended complaint filed August 26, 1974. However, the legal implication of certain of these allegations will be affected by taking judicial notice of the municipal court file in the unlawful detainer action as was also done by the trial court.

I

The theory of the first count of the amended complaint, the objective of which is to cancel the trustee's deed, received by the defendant Pfeifers following the nonjudicial foreclosure, appears to be that the trust deed containing the power of sale relied upon in effecting the foreclosure was and is unforceable because given to secure an obligation arising out of a usurious transaction. Plaintiffs argue that the transaction with Dr. Lord was usurious because the note itself called for 10 percent interest while Dr. Lord received an additional 6 1/2 percent interest on the $4,500 be deposited in a savings account

with the bank as security for the bank's loan of that same amount to the plaintiffs.

There are extensive arguments in the briefs on both sides going to the issue of whether the transaction described was usurious. Without going into such arguments, it is enough to observe, even though the transaction was not usurious, that there is no need to resolve that question because it is not dispositive of the key substantive issue here of whether the trust deed was enforceable.

In other words, even assuming the lending transaction were usurious, that circumstances would have had no impact on the validity and enforceability of the deed of trust itself. If a transaction is usurious, it is not void or even voidable, only the interest provisions are void. The borrower is still liable to repay the principal. (Rochester Capital Leasing Corp. v. K&L Litho Corp., 13 Cal. App. 3d 697, 703.) The law provides specific remedies to the victims of usurious transactions. Not only is the borrower relieved of having to pay the usurious interest,

but, if he has actually paid it, he may be entitled to recover a penalty of treble the amount paid. However, in no situation is the borrower entitled to such damages unless he has actually paid the usurious interest. (See Brocks v. Naseath, 134 Cal. App. 2d 23, 25.)

Otherwise, it is not possible to set aside a trustee's sale unless there has been a valid tender of the amount in default. (Karlsen vs. American Sav. & Loan Assn., 15 Cal. App. 3d 112, 117.) Here no tender was alleged.

Based upon the foregoing, we hold that plaintiffs, by pleading only that the lending transaction which underlay the delivery of the third deed of trust was usurious, have failed to state a cause of action for cancellation of the trustee's deed under which the defendants Pfeifer and their successors claim ownership of the lands in question.

Plaintiffs have alleged additional facts which they argue render the trust deed unenforceable and which in turn render the trustee's sale void. In Paragraph 13, plaintiffs

allege that the trust deed provided for a short-term, lump-sum payment "contrary to public policy expressed in the Statutes of the State of California." Such an argument is almost too frivolous to warrant refutation. There is a provision of the Business and Professions Code which condemns such loans when negotiated by real estate licenses, but such policy hardly applies to the facts alleged herein.

Plaintiffs next basis for justifying cancellation of the trustee's deed was alleged in paragraph 14, the supposed infirmity being that the third trust deed encumbrance was accomplished without the required permission of the Federal Land Bank, beneficiary under the first deed of trust. Again, such contention borders on the specious. If anyone has a cause of action challenging the validity of the third deed of trust on such ground, it would be the Federal Lank Bank; surely it would not be the plaintiffs who created the junior encumbrance in direct violation of their own agreement with the Federal Land Bank.

Next, plaintiffs tried, although the theory is somewhat obscure, to introduce the color of invalidity into the case by means of pleading misrepresentations, either innocent, negligent, or fraudulent. Such misrepresentations appear to refer to those made by the Pfeifers to the trustee to the effect that the note and trust deed were lawful and enforceable obligations, when in fact, allegedly, they were not. In particular, the implication is, because the transaction was usurious, that the note could not be in default. In this latter connection, we have already observed that a usurious interest provision does not relieve the debtor of his obligation to repay the principal.

Regardless, dealing with the fraud theory itself, plaintiffs failed to allege that they relied upon any misrepresentations. Indeed, they alleged that they told the trustee that the note was not lawful.

Otherwise, plaintiffs have also failed to allege that the supposed misrepresentations were made with the intent to induce such reliance by plaintiffs. A "defendant is liable

only to those persons to whom the representation was made with such intent..." (Walters v. Marler, 83 Cal. App. 3d 1, 19; quoting from 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, Section 467, p. 2729.)

Finally, plaintiffs failed to allege a misrepresentation of fact. The complaint itself admits that the note was "long in default." Thus, the only representation alleged is that the note was "lawful and proper." This is not a misrepresentation of fact; it is a representation of a legal conclusion. Generally, misrepresentations must be of past or existing facts. (Borba v. Thomas, 70 Cal. App. 3d 144, 152.) Absent "special circumstances" a misrepresentation of law is not actionable. (Bledsoe v. Watson, 30 Cal. App. 3d 105, 110.)

Based upon the foregoing, the plaintiffs' efforts to characterize the trustee's deed as void because the sale was induced by fraud is hopelessly illogical as plaintiffs have attempted to plead such a theory of action. As it turns out, if the Pfeifers "represented" to

the trustee that the obligation secured by the third deed of trust was lawful and in default, they were correct in saying so.

Finally, as to the defendants claiming an interest in the land, plaintiffs urge that trustee's deed should be cancelled because, as alleged in paragraph 22, it "is further void in that all of those proceedings for notice and publication provided in Section 2994 of the California Civil Code were not complied with." We assume that plaintiffs intended to refer to section 2924 and not 2994.

The fallacy of plaintiffs' position here is that any alleged infirmities arising from a failure to comply with section 2924 were tried in the unlawful detainer action and resolved against them. Full compliance with section 2924 of the Civil Code must be tried and decided in any unlawful detainer brought pursuant to Code of Civil Procedure section 1161a following a trust deed foreclosure. (Vella v. Hudgins, 20 Cal. 3d 251, 255;

Gonzalez v. Gem Properties, Inc., 37 Cal. App. 3d 1029, 1035-1036; Kartheiser v. Superior Court, 174 Cal. App. 2d 617, 620.) The unlawful detainer action here involved was brought under Code of Civil Procedure section 116a following the Civil Code section 2924 foreclosure. Because adjudication of compliance with that section was mandatory in the unlawful detainer action, the court's entry of judgment therein against the plaintiffs and in favor of the Pfeifers settled that issue between them, and it is therefore res judicata and binding on the plaintiffs in the present action.

As the court stated in Vella, "A qualified exception to the rule that title cannot be tried in unlawful detainer is contained in Code of Civil Procedure section 1161a, which extends the summary eviction remedy beyond the conventional landlord-tenant relationship to include certain purchasers of properties such as Hudgins. Section 1161a provides for a narrow and sharply focused examination of title. To establish that he is a proper plaintiff, one who has purchased property at a trustee's

sale and seeks to evict the occupant in possession must show that he acquired the property at a regularly conducted sale and thereafter "duly perfected" his title. (Section 1161a, subd. 3.) Thus, we have declared that "to this limited extent, as provided by the status,... title may be litigated in such a proceeding." (Cheney v. Trauzettel, supra, 9 Cal. 2d at p. 159.)

Applying the traditional rule that a judgment rendered by a court of competent jurisdiction is conclusive as to any issues necessarily determined in that action, the courts have held that subsequent fraud or quiet title suits founded upon allegations of irregularity in a trustee's sale are barred by the prior unlawful detainer judgment. (Citation.)" (Vella v. Hudgins, supra, 20 Cal. 3d 251, 255-256.

Parenthetically, we observe, although Safeco was not a party to the unlawful detainer action, under the doctrine of collateral estoppel set forth in Bernhard v. Bank of

America, 19 Cal. 2d 807, 810-813, plaintiffs are likewise precluded from arguing against Safeco that there were infirmities in compliance with Section 2924. The other defendants, of course, claim through the Pfeifers.

II

Turning to the second count, labeled to be for quiet title, it contains the standard allegations that plaintiffs are the owners and that defendants claim adversely to plaintiffs. Ordinarily, this would suffice, but plaintiffs incorporated the 24 paragraphs of the first count. In doing so they have pleaded themselves out of court.

Plaintiffs rely on the general rule that an action for quiet title may be couched in general terms of plaintiffs' ownership and defendants' assertion of an adverse claim. On this point plaintiffs cite authorities which, while not expressly overrulled, are no longer followed.

In Leeper v. Beltrami, 53 Cal. 2d 195, the court held when an action for quiet title attacks an instrument on the basis of fraud,

that the allegedly defrauded party must plead the pertinent facts relied upon. (Id. at p. 214) The court also indicated, when the right to quiet title is dependent upon successful cancellation of an instrument, that the quiet title action is merely incidental to the action for cancellation. (Id. at p. 216.)

Thus, under the modern view, a court should "look beyond the relief sought, and to view the matter from the basic cause of action giving rise to the plaintiff's right to relief." (Id. at p. 214.) Accordingly, the court observed that the outmoded "Thompson[2] case permits a plaintiff who has executed a contract to secure relief by simply couching his cause of action in terms of quiet title, and thus permits him to avoid and evade the normal requirements of a cause of action to avoid that contract. This is pure formalism and should not be countenanced. The case is disapproved." (Id. at p. 216.)

The court agreed with the ruling in Thompson that an action for cancellation of

2. Thompson v. Moore, 8 Cal. 2d 367.

instruments and quiet title states but one cause of action but that action is not quiet title; quiet title is only the relief granted if the court determines that the title belongs to the plaintiff. (Id. at p. 216.)

Plaintiffs cannot merely rely on allegations of plaintiffs' ownership and defendants' adverse claim. In order to be entitled to quiet title relief, plaintiffs must plead a substantive right to relief. This they have not done.

III

The third count, while purporting to be one to quiet title, actually alleges a slander of title through the device of certain misrepresentations, not defined. Here again the first 24 paragraphs of the first count were incorporated by reference. The only other allegation of wrongdoing in this count was a misrepresentation of the actual value of property in the course of the unlawful detainer action.

In our view this adds nothing to the abortive efforts contained in the first count,

and, because the third count is essentially an effort to rely on the charging allegations of the first, it too fails to state a cause of action.

IV

In the fourth count, the plaintiffs sought equitable relief from the municipal court judgment entered against them in the unlawful detainer action. Here the plaintiffs have not only incorporated the 24 paragraphs of the first count, but the additional allegations of counts two and three. Then through 13 more paragraphs extending to four pages, plaintiffs set forth in particular detain the entire procedural history of the unlawful detainer action. With no charging allegations of substance, plaintiffs then make the leap to a position that they are facing a forfeiture from which they are entitled to be relieved.

Their brief is of little assistance in demonstrating that plaintiffs face a forfeiture from which they are entitled to be

relieved.

Their brief is of little assistance in demonstrating that plaintiffs face a forfeiture. They argue that the propery is worth $260,000 and that they face its loss because of default on a usurious obligation of $4,500. This argument is unpersuasive, because nowhere do they allege that they have an actual equity in the premises. For all the record shows the aggregate amount of the first and second trust deed emcumbrances may well exceed the value of the property. However, that is not the point. Without alleging the extent of their interest in the property before the foreclosure, plaintiffs have not even made a start at demonstrating an entitlement to a relief from forfeiture.

THE LATTER DAY MOTIONS TO AMEND

Plaintiffs complain on appeal that the trial court abused its discretion in not allowing them to amend their complaint before going to trial. When the court had reached its tentative decision to grant the motion

for judgment on the pleadings, it did afford plaintiffs an opportunity to try to plead a viable cause of action within the same general set of facts contained in their amended complaint against which the defendants' motions had been directed. Such efforts were undertaken, and the court's rulings thereon amounted to decisions that the proffered efforts were beyond the bounds of the general set of facts contained in the amended complaint of August 26, 1974.

More particularly, what happened was this. Ultimately, on August 10, 1979, plaintiffs submitted two proposed amended complaints, one dated August 7, 1979, and one dated August 10, 1979, both of which were entitled "Second Amended Complaint." For purposes of clarity, the one dated August 7 was relabeled "Third Amended Complaint," and the one dated August 10 was relabeled "Fourth Amended Complaint."

In the proposed Third Amended Complaint dated August 7, 1979, plaintiffs again attempted

a bold departure from the guidelines established by the trial court when the opportunity to amend was offered. Not only were new facts alleged and new legal theories attempted ("Conspiracy," "Tortious Interference With Business Relationships" and untitled claims of Emotional Distress), but a newly named party (Chris Loukas) was added, and entirely new wrongdoings allegedly performed by him back in 1973 largely replaced the allegations on which the case had come to trial.

Defendants had already pointed out to the law and motion department and to the trial court when the proposed second amended complaint was offered, because of the numerous pleading defects it contained, that it would have to be demurred to if allowed. Moreover, because of the radical departure from the facts previously pled, defendants demonstrated that they would have to start all over again on their trial preparation. The radically new proposed third amended complaint had the same defects, albeit in a newly typed format.

By contrast, the proposed fourth amended complaint dated August 10, 1979, initially appeared to be an attempt to rely primarily on the allegations of fact set forth in the first amended complaint. However, when read closely, the proposed first amended complaint, like the proposed third amended complaint, contained many of the same defects found in the earlier proposed amended complaints, together with additional defects.

In view of these defects, it was urged that the trial court deny plaintiffs' motion to file the proposed third and fourth amended complaints under the well established rule in California that it is proper to deny leave to file a proposed amended pleading when the pleading is insufficient to state a cause of action, or is otherwise defective. (Vogel v. Thrifty Drug Co., 43 Cal. 2d 184, 189; Oswald v. Northrop Aircraft Inc., 62 Cal. App. 2d 824, 828.)

After further argument on August 13, 1979, the trial court ruled that neither of

the newly proposed amended complaints could be filed. Defendants' motions for judgment on the pleadings were further argued on that same date, argued yet further a week later, and were granted.

No good purpose would be served by going into an extanded analysis comprised of a comparison of the proposals represented by plaintiffs' several amended complaints and the one upon which the parties went to trial. It is enough to observe that these efforts include an attempt to bring in (again) a new party, Chris Loukas, a former Safeco employee, and to include, among others, a new theory of action based on a tortious interference with advantagous business relationship. Clearly such allegations substantially exceed the guidelines laid down by the trial court.

To have allowed plaintiffs to go beyond the general facts pled by such amendments at the beginning of trial would have been not only prejudicial to the defendants, but also in excess of the scope of amendments which may be allowable in the facts of a

request for judgment on the pleadings. (See Marvin vs. Marvin, 18 Cal. 3d 660, 667, fn. 2.)

Otherwise, such extended analysis is rendered unnecessary because, beyond the foregoing substantive matters, plaintiffs offered no legal excuse for their late demands to change completely the factual complexion of the case. Actually, the record reflected that since 1975 they had been thinking about doing what they tried at the last minute, but never got around to it because one of them had a "mental block"; and because their attorney since 1975, by his own admission in the record, had not been able to understand the theories of action urged upon him by plaintiff James Kellam.

In sum, the record is replate with admissions by plaintiff James Kellam and plaintiffs' counsel that they had felt for years that their pleadings should be amended.

A plaintiffs who wants to change his pleadings should do so promptly and in such a way as to allow the defendants to prepare to meet the charges at trial.

Plaintiffs ignored these two basic

rules of orderly procedure and sought to change substantially the complexion of the case on the eve of trial, a trial set at their request because of the approaching five year deadline in August 1979.

DISPOSITION

Because the amended complaint of August 26, 1974, did not state a cause of action against any of the defendants, and because the court did not abuse its discretion in denying plaintiffs' eleventh hour efforts to amend after affording them a chance to do so, the judgment was affirmed.

/s/ McDaniel
J.

We concur:

/s/ Morris
P.J.

/s/ Kaufman
J.

APPENDIX D KELLAM I COMPLAINT

FILED
Riverside Cty.
Aug 26 1974

IN THE SUPERIOR COURT OF THE

STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF RIVERSIDE

EDNA S. KELLAM, et al. Plaintiffs, vs. JAMES P. PFEIFER, et al. Defendants.	CASE NO: 109876 AMENDED COMPLAINT FOR (1) CANCELLATION OF VOID INSTRUMENTS, (2) QUIET TITLE, (3) SLANDER OF TITLE, AND (4) EQUITABLE RELIEF FROM JUDGMENT

//

THIRD CAUSE: QUIET TITLE (SLANDER OF TITLE)

1

Plaintiffs incorporate the allegations of Paragraph 1 through 24 of FIRST CAUSE, in this THIRD CAUSE, as if set forth in their entirety.

2

That defendants have wrongfully disparaged plaintiff's title in that they willfully and unlawfully and maliciously, and with

an intention to permanently deprive plaintiffs of their property, did those acts and made those representations with knowledge of their falsity and an intention to deceive the trustee and plaintiffs.

3

And with said mental state, and in furtherance of their plan, represented to the Riverside Municipal Court that the reasonable rental value was $18.33 per day, known the same to be a false statement of opinion, in a fraud upon the Court and to invoke the power of the Court to effectuate their wrongful intentions.

4

That plaintiffs have suffered pecuniary damages in the reasonable value of costs and legal services in the amount of $1,500.00 as a direct and proximate result of the conduct of defendants, and as a further proximate result of said acts propective purchasers of the described premises concluded not to purchase ten acres of the described premises

to plaintiffs damage in the amount of $60,000.00. As a direct and proximate result of said acts of defendants, plaintiffs have suffered damage in emotional distress in the sum of $150,000.00.

FOURTH CAUSE: EQUITABLE RELIEF FROM JUDGMENT

Plaintiffs incorporate the allegations of Paragraph 1 through 24 of FIRST CAUSE, and Paragraph 2 and 3 of SECOND CAUSE, and Paragraphs 2, 3, and 4 of THIRD CAUSE in this FOURTH CAUSE, as if set forth in their entirety.

2

That it appears from the record, that a complaint was filed March 26, 1974 in the Municipal Court in Riverside Judicial District in an action for unlawful detainer of the premises described herein, alleging, among other things, that defendants, herein, who were plaintiffs therein, were owners of the described premises.

3

That they were assignees of a Trust

Deed wherein plaintiffs herein were trustors and SECURITY TITLE COMPANY was trustee that said Note was in default, that defendants requested SECURITY TITLE INSURANCE COMPANY to file Notice of Default and Election to Sell. That Trustee gave notice in the form required by Section 2924 of the Civil Code and Section 692 of the Code of Civil Procedure. That on December 14, 1973 Trustee sold the premises to defendants herein, and issued his deed therefor. That on January 30, 1974 defendants served thirty day notice to quit and deliver up possession to defendants herein and that the reasonable rental value of the premises was $18.33 per day.

4

The answer, of the last plaintiff, who was defendant therein, to answer on July 1, 1974, and all others, denied that defendants herein were owners of the described premises, denied on information and belief that defendants herein were assignees. Admitted that defendants herein requested SECURITY

TITLE INSURANCE COMPANY to File Notice of Default and Election to Sell and denied upon information and belief that the trustee had conformed to Section 2924 of the Civil Code and Section 692 of the Code of Civil Procedure. Admitted that on December 14, 1973 the trustee sold the premises to defendants herein, and issued the deed therefore, and allege that said Note and obligation were usurious and illegal, and that defendants, herein, are not bonafide purchasers for value and that every demand for payment made upon plaintiffs, herein, has been illegal, in that defendants, herein, and SECURITY TITLE were put on notice thereof at all times. Admitted service of a thirty day notice to quit on January 30, 1974, and allege that such was not sufficient to state a Cause of Action under Section 2924 of the Civil Code, and alleged that plaintiffs, herein, occupied under claim of right, as owners. Denied for want of information and belief, generally and specifically that the rental value was $18.33 per day.

5

The First Affirmative Defense was failure to state a Cause of Action. The Second Affirmative Defense was illegality, that defendants, herein, were not bonafide purchasers for value, and set forth each chain of ultimate fact therefore. The Third Affirmative Defense was failure to state facts sufficient to confer jurisdiction.

6

On August 15, 1974 the case was called for trial. Plaintiffs, herein, moved the Court to adopt the last Answer as the Answer of all parties. The motion was not opposed and was granted. Thereafter, plaintiffs, herein, filed their written Motion, supported by declaration, attacking the jurisdiction of the Court. A copy of which is marked Exhibit "C" of the Application For a Temporary Restraining Order, which is attached hereto and incorporated herein as if set forth in its entirety. The court denied the Motion, stating that plaintiffs, herein,

had admitted the same. Thereafter the Court acted in excess of jurisdiction and refused to make Findings of Fact and Conclusions of Law on the purported basis that it was not timely filed, when it was, and there being no Court Reporter, the only evidence other than the pleadings of the action of the Court, is the Clerk's Register of Actions, a certified copy of which is marked Exhibit "B" of the Application For a Temporary Restraining Order, attached hereto and incorporated by reference herein, as if set forth in its entirety.

7

The Court stated that all of the necessary allegations of the cause of action were admitted by the pleadings, declined to take evidence on any subject except whether or not plaintiffs, herein, had received notice.

8

After written notice for Findings of Fact and Conclusions of Law, was filed, and denied, judgment was made by the Court and

entered by the Clerk, for restitution of the premises and for damages, though no evidence had been taken thereon.

9

Thereafter Writ of Execution was applied for by defendants, herein, issued by the Clerk, a Notice to Vacate the Premises was attached to the front door of 9209 Dufferin Avenue, on

//

APPENDIX E UNLAWFUL DETAINER JUDGMENT

FILED
MUNICIPAL COURT
RIVERSIDE JUD. DIST.
1974 Aug 16

MUNICIPAL COURT OF CALIFORNIA, COUNTY OF RIVERSIDE

RIVERSIDE JUDICIAL DISTRICT

JAMES P. PFEIFER and SHIRLEY A PFEIFER,	)	
Plaintiffs,	)	NO. 39867
vs.	)	JUDGMENT
JAMES LYNWOOD KELLAM, KATHRYN L. KELLAM, EDNA S. KELLAM, DAVID KELLAM, and Tenants in Possession, JOHN DOE and Tenant in Trailer Home, and DOES I-X, Defendants.	)	

This cause came on regularly for trial on August 15, 1974 in Department 22 of the above-entitled court, the Honorable John A. Barnard, Judge presiding, sitting without a jury, a jury having been duly waived. Plaintiffs appeared by their attorney, JACOB N. PEILTE, and Defendant, JAMES LYNWOOD KELLAM, appearing in pro per and as counsel for Defendants, KATHRYN L. KELLAM and EDNA S. KELLAM.

Evidence both oral and documentary having been presented by both parties, the cause having been argued and submitted for decision and Findings of Fact and Conclusions of Law not having been timely requested;

IT IS ORDERED, ADJUDGED and DECREED that:

1. Plaintiffs recover from Defendants possession of the premises described in the Complaint, being that property situated in the Riverside Judicial District, County of Riverside, State of California, described as follows:

> 9203-9209 Dufferin Avenue
> Riverside, California
> (legal description attached and incorporated herein as though set forth in full.

2. Damages in the amount of $4,472.52.

3. Costs of suit incurred herein.

DATED: August 16, 1974

/s/
JUDGE OF THE MUNICIPAL COURT

I hereby certify this to be a true copy of the judgment entered in Judgment book #39867 Page One, August 16, 1974.

R.W.FOWLER, CLERK

BY /s/ DEPUTY CLERK
M.E. JOHNDON

APPENDIX F

SECTION 1161(a)

CODE OF CIVIL PROCEDURE, 1973

SECTION 1161(a). HOLDING OVER AFTER SALE UNDER EXECUTION, MORTGAGE OR TRUST DEED.

In either of the following cases, a person who holds over and continues in possession of real property, after a three-day written notice to quit the same, shall have been served upon him, or if there is a subtenant in actual occupation of the premises, also upon such subtenant, as prescribed in Section 1162 of the Code of Civil Procedure, may be removed therefrom as prescribed in this chapter.

1. Where the property has been duly sold by virtue of an execution against him, or a person under whom he cl s, and the title under the sale has been duly perfected.

2. Where the property has been duly sold, upon the foreclosure, by proceedings taken as prescribed in this code, of a mortgage, or under an express power of sale

contained therein, executed by him, or a person under whom he claims, and the title under the foreclosure has been duly perfected.

3. Where the property has been duly sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust executed by him, or a person under whom he claims, and the title under the sale has been duly perfected.

4. Where the property has been duly sold by him, or a person under whom he claims, and the title under the sale has been duly perfected.

APPENDIX G

SECTION 2924

CIVIL CODE OF CALIFORNIA, 1973

SECTION 2924. TRUST DEEDS EXCEPTED-EXERCISE OF POWER OF SALE IN TRUST DEED OR MORTGAGE.

Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge. Where, by a mortgage created after July 27, 1917, of any estate in real property, other than an estate at will or for years, less than two, or in any transfer in trust made after July 27, 1917, of a like estate to secure the performance of an obligation, a power of sale is conferred upon the mortgagee, trustee, or any other person, to be exercised after a breach of the obligation for which such mortgage or transfer is a security, such power shall not be exercised except where such mort-

gage or transfer is made pursuant to to an order, judgment, or decree of a court of record, or to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations, or is made by a public utility subject to the provisions of the Public Utilities Act, until (a) the trustee, mortgagee, or beneficiary, shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part of parcel thereof is situated, a notice of default, identifying the mortgage or deed of of trust by stating the name or names of the trustor or trustors and giving the book and page where the same is recorded or a description of the mortgaged or trust property and containing a statement that a breach of the obligation for which such mortgage or transfer in trust is security has occurred, and setting forth the nature of such breach and of his election to sell or cause to be sold such property to satisfy the obligation;

(b) not less than three months shall thereafter elapse; and (c) after the lapse of the three months the mortgagee, trustee or other person authorized to make the sale shall give notice of sale, stating the time and place thereof, in the manner and for a time not less than that. A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices for which requests have been recorded or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with such requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.

SECTION 2924b. COPIES OF NOTICES OF SALE AND DEFAULT-HOW PROCURED.

Any person desiring a copy of any

Notice of default and of any notice of sale under any deed of trust or mortgage with power of sale upon real property, as to which deed of trust or mortgage the power of sale cannot be exercised until such notices are given for the time and in the manner provided in Section 2924 may, at any time subsequent to recordation of such deed of trust or mortgage and prior to recordation of notice of default thereunder, caused to be filed for record in the office of the recorder of any county in which any part or parcel of the real property is situated, a duly acknowledged request for a copy of any such notice of default and of sale. This request shall be signed and acknowledged by the person making the request, specifying the name and address of the person to whom the notice is to be mailed, shall identify the deed of trust or mortgage by stating the names of the parties thereto, the date of recordation thereof and the book and page where the same is recorded or the recorder's number and shall be in substantially the following form:

"In accordance with Section 2924b, Civil Code, request is hereby made that a copy of any notice of default and a copy of any notice of sale under the deed of trust (or mortgage) recorded_____, 19___, in Book_____page_____records of_____ County, (or filed for record with recorder's serial number_____,_____County) California, executed by_____as trustor (or mortgagor) in which_____, is named as beneficiary (or mortgagee) and_____as trustee be mailed to_____at_____.

Signature_____"

Upon the filing of record of such request, the recorder shall index in the general index of grantors the name of the trustors (or mortgagor) recited therein and the names of persons requesting copies.

The mortgagee, trustee or other person authorized to record the notice of default, shall within 10 days following recordation of such notice of default deposit or cause to be deposited in the United States mail an envelope, registered and with postage prepaid, containing

a copy of such notice with the recording date shown thereon, addressed to each person whose name and address are set forth in a duly recorded request therefor, directed to the address designated in said request, and at least 20 days before date of sale the mortgagee, trustee or other person authorized to make the sale shall deposit or cause to be deposited in the United States mail an envelope, registered and with postage prepaid, containing a copy of the notice of the time and place of sale, addressed to each person whose name and address are set forth in a request therefor recorded, within the time herein provided.

Any deed of trust or mortgage with power of sale hereafter executed upon real property may contain a request that a copy of any notice of default and a copy of any notice of sale thereunder shall be mailed to any person a party thereto at the address of such person given therein, and a copy of any notice of default and of any notice of

sale shall be mailed to each such person at the same time and in the same manner required as though a separate request therefor had been filed by each of such persons as herein authorized. If any deed of trust or mortgage with power of sale executed after September 19, 1939, except a deed of trust or mortgage of any of the classes excepted from the provisions of Section 2924 does not contain a request of the trustor or mortgagor for special notice at the address of such such person given therein or does contain such request but no address of such person is given therein and if no request for special notice by such trustor or mortgagor in substantially the form set forth in this section has subsequently been recorded, a copy of the notice of default shall be published once a week for at least four weeks in a newspaper of general circulation in the county in which the property is situated, such publication to commence within 10 days after the filing of the notice of default. In lieu of such publication a copy of the notice of default may be delivered personally to the

trustor or mortgagor within such 10 days or at any time before publication is completed.

No request for copy of any notice filed for record pursuant to this section nor any statment or allegation in any such request nor any record thereof shall affect the title to real property or be deemed notice to any person that any person requesting copies of notice has or claims any right, title or interest in, or lien or charge upon the property described in the deed of trust or mortgage referred to herein.

SECTION 2924c. REINSTATEMENT AFTER DEFAULT IN PAYMENT-NOTICE.

(a) Whenever all or a portion of the principal sum of any obligation secured by deed of trust or mortgage on real property hereafter executed has, prior to the maturity date fixed in such obligation, become due or been declared due by reason by default in payment of interst or of any installment of principal, or by reason of failure of trustor or mortgagor to pay, in accordance with the terms of such obligation or of such deed of

trust or mortgage, the trustor or mortgagor or his successor in interest in the mortgaged or trust property or any part thereof, or any beneficiary under a subordinate deed of trust or any other person having a subordinate lien or encumbrance of record thereon, at any time within three months of the recording of the notice of default under such deed of trust or mortgage, if the power of sale therein is to be exercised, or otherwise at any time prior to entry of the decree of foreclosure, may pay to the beneficiary or the mortgagee or their successors in interest, respectively, the entire amount then due under the terms of such deed of trust or mortgage and the obligation secured thereby (including costs and expenses actually incurred in enforcing the terms of such obligation, deed of trust or mortgage, and trustee's or attorney's fees actually incurred not exceeding one hundred dollars ($100) in case of a mortgage and fifty dollars ($50) in case of a deed of trust or one-half of 1 percent of the entire unpaid principal sum secured, whichever is greater)

other than such portion of principal as would not then be due had no default occurred, and thereby cure the default theretofore existing, and thereupon, all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and deed of trust or mortgage shall be reinstated and shall be and remain in force and effect, the same as if no such acceleration has occurred. The provisions of this section shall not apply to bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations or made by a public utitlity subject to the provisions of the Publics Utilities Code.

SECTION 2924f. NOTICE OF SALE OF PROPERTY UNDER POWER OF SALE IN DEED OF TRUST OR MORTGAGE.

As used in this section and Sections 2924g and 2924h "property" means real property or a leasehold estate therein.

Before any sale of property can be made under the power of sale contained in any

deed of trust or mortgage notice of the sale thereof must be given by posting a written notice of the time and place of sale, and describing the property to be sold, at least 20 days before the date of sale in one public place in the city where the property is to be sold, if the property is to be sold in a city, or, if not, then in one public place in the judicial district in which the property is to be sold, and publishing a copy thereof once a week for the same period, in some newspaper of general circulation published in the city in which the property or some part thereof is situated, if any part thereof is situated in a city, if not, then in some newspaper of general circulation published in the judicial district in which the property or some part thereof is situtated, or in case no newspaper of general circulation is published in the city or judicial district, as the case may be, in some newspaper of general circulation published in the county in which the property or some part thereof is situated. A copy of such notice of sale shall

also be posted in some conspicuous place on the property to be sold at least 20 days before date of sale. In addition to any other description of the property, the notice shall describe the property by giving its street address, if any, or other common designation, if any; but if a legal description of the property is given, the validity of the notice shall not be affected by the fact that the street address or other common designation recited is erroneous or that the street address or other common designation is omitted. The term newspaper of general circulation as used herein is as defined in Article 1(commencing with Section 6000) of Chapter 1, Division 7, Title 1 of the Government Code.

SECTION 2924g. PROCEDURE FOR SALE OF PROPERTY-POSTPONEMENT OF SALE.

All sales of property under the power of sale contained in any deed of trust or mortgage shall be held in the county where such property or some part thereof is situated, and shall be made at auction, to the highest bidder,

between the hours of 9 in the morning and 5 in the afternoon. When the property consists of several known lots or parcels they shall be sold separately unless the deed of trust or mortgage provides otherwise; or when a portion of such property is claimed by a third person, and he requires it to be sold separately, such portion may be thus sold. The trustor, if present at the sale, may also, unless the deed of trust or mortgage otherwise provides, direct the order in which property shall be sold, when such property consists of such several known lots or parcels which may be sold to advantage separately, and the trustee shall follow such direction. After sufficient property has been sold to satisfy the indebtedness no more can be sold.

If the property under power of sale is in two or more counties the public auction sale of all of the property under the power of sale may take place in any one of the counties where the property or a portion thereof is located.

There may be a postponement of the sale proceedings at any time prior to the completion of the sale thereof at the discretion of the trustee, or if the beneficiary instructs the trustee to postpone the sale proceedings. The notice of each postponement shall be given by public declaration by the trustee at the time and place last appointment for sale. Such public declaration of the postponement shall also set forth the new date, time, and place of sale, which place of sale shall be the same place as originally fixed by the trustee for the sale. No other notice of postponement need be given.

SECTION 2924h. TRUSTEE'S SALE-BIDDING RULES.

(a) Each and every bid made by a bidder at a trustee's sale under a power of sale contained in a deed of trust or mortgage shall be deemed to be an irrevocable offer by that bidder to purchase the property being sold by the trustee under such power of sale for the amount of the bid. Any second or subsequent bid by the same bidder or any other bidder for a higher amount shall be a

cancellation of the prior bid.

(b) At the trustee's sale the trustee shall have the right (1) to require every bidder to show evidence of his ability to deposit with the trustee the full amount of his final bid in cash, or the equivalent of cash in a form satisfactory to the trustee, prior to and as a condition to the recognizing of such bid, and to conditionally accept and hold these amounts for the duration of the sale, and (2) to require the last and highest bidder to deposit, if not deposited previously, the full amount of his final bid in cash, or the equivalent of cash in a form satisfactory to the trustee, immediately prior to the completion of the sale, the completion of the sale being so announced by the fall of the hammer or in other customary manner. The present beneficiary of the deed of trust under foreclosure shall have the right to offset his bid(s) only to the extent of the total amount due him including the trustees fees and expenses.

(c) If the trustee has not required the last and highest bidder to deposit the cash

or equivalent in the manner set forth in paragraph two of subdivision (b), the trustee shall complete the sale. If the last and highest bidder then fails to deliver to the trustee, when demanded, the amount of his final bid in cash, or the equivalent of cash in a form satisfactory to the trustee, such bidder shall be liable to the trustee for all damages which the trustee may sustain by the refusal to deliver to the trustee the amount of the final bid, including any court costs and reasonable attorneys' fees.

If the last and highest bidder willfully fails to deliver to the trustee the amount of his final bid in cash, or the equivalent of cash, in a form satisfactory to the trustee, such bidder shall be guilty of a misdemeanor punishable by a fine of not more than two thousand five hundred dollars ($2,500).

(d) Any postponement of discontinuance of the sale proceedings shall be a cancellation of the last bid.

(e) In the event that this section

conflicts with any other statutory provision of the law, then this section shall prevail.

APPENDIX H REHEARING ORDER

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

Filed
June 5, 1987

EDNA S. KELLAM, et al. Appellant	)	
v.	)	
JAMES P. PFEIFER, et al. Respondent	)	Riverside County No. 132412

THE COURT:

The Petition for Rehearing is DENIED.

McDANIEL
Acting Presiding Justice

APPENDIX I SUPREME COURT REVIEW ORDER

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 2, No. E001226
S001419

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
AUG 12, 1987

KELLUM et al.

v.

PFEIFER et al.

Appellants petition for review DENIED.

PANELLI
Acting Chief Justice

APPENDIX J NOTICE OF APPEAL

FILED
Sep. 3, 1987

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

EDNA S. KELLAM, KATHRYN L. KELLAM, AND JAMES L. KELLAM, Plaintiffs and Appellants	)	APPEAL NUMBER E001226
	)	Riverside County Number 132412
v.	)	
JAMES P. PFEIFER, SHIRLEY PFEIFER, and SAFECO TITLE INSURANCE COMPANY, INC., Defendants and Respondents	)	

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES

Notice is hereby given that EDNA S. KELLAM, and JAMES L. KELLAM, Plaintiffs and Appellants above named, hereby appeals to the Supreme Court of the United States from the final opinion of the Court of Appeal, Fourth Appellate District, Division Two affirming the

judgment of the trial court, sustaining demurrer without leave to amend Filed in the above entitled Court, May 15, 1987, Petition for Rehearing in the same Court Denied June 5, 1987. Petition for Review in the Supreme Court of California Denied August 12, 1987.

This appeal is taken pursuant to Title 28 United States Code section 1257, subparagraph (2).

DATED: September 2, 1987

/s/
RICHARD MICHAEL CANTILLON
Attorney at Law
Suite 222, Lerner Building
3631 Tenth Street
Riverside, Ca. 92501

APPENDIX K KELLAM I

JUDGMENT ON THE PLEADINGS

FILED
Riverside County
August 21 1979

SUPERIOR COURT OF CALIFORNIA

COUNTY OF RIVERSIDE

EDNA S. KELLAM, et al. Plaintiffs, vs. JAMES P. PFEIFER, et al. Defendants.	NO. 109 876 JUDGMENT ON THE PLEADINGS

Pursuant to an order specially setting the case for trial prior to expiration of five years from the date of filing of the original complaint, this case was called for trial on July 23, 1979 and was ultimately assigned to be tried before the undersigned, sitting in Department 7 of the above-entitled court.

Plaintiffs Edna S. Kellam, Kathryn L. Kellam and James L. Kellam ("Kellams") appeared by their co-counsel of record, Dale C. Miller,

Esq, and James L. Kellam, Esq.; Defendant SAFECO Title Insurance Company ("Safeco") appeared by William R. DeWolfe, Esq. and Merrill F. Storms, Jr., Esq. of Best, Best & Krieger; Defendants James P. Pfeifer and Shirley A. Pfeifer (Pfeifer"), Garrett K. Spates and Helen M. Spates ("Spates") and Thomas L. Sullivan and Patricia L. Sullivan ("Sullivan") appeared by Andrew Smith, Esq. of the Law Offices of Fred Crane, and Defendant Birth Development Company, Inc. ("Birth") appeared by Evan G. Evans, Esq. of Clayson, Rothrock & Mann.

Plaintiffs renewed their unsuccessful July 16, 1974 motion in another department to either amend the August 26, 1974 Amended Complaint or file a Second Amended Complaint, and said renewed motion was denied. Each of the defendants then made a motion for Judgment on the Pleadings. The court then gave plaintiffs leave to propose amendments within the scope of the general set of facts encompassed in their August, 1974 Amended

Complaint, and two proposed amended complaints were lodged with the court (thereafter designated as Plaintiffs' Proposed "Third Amended Complaint..." and Plaintiffs' Proposed "Fourth Amended Complaint..."). In addition, plaintiffs filed a motion to consolidate this case with case number 132412 pending in the Riverside Superior Court, and to then continue the consolidated cases. Leave to file the Second, Third, and Fourth Proposed Amended Complaints was denied by reason of defects therein, by reason of plaintiffs' failure to confine themselves to the general set of facts included within the August, 1974 Amended Complaint on which the case was assigned for trial, and by reason of plaintiffs' unexcusable delay, to defendants' prejudice, in proposing such amendments. Plaintiffs' motion to consolidate and continue was also denied.

Plaintiffs declined to offer further proposed amendments and the court on August 13, 1979 granted defendants' respective Motions for Judgment on the Pleadings by reason of the failure of the August 26, 1974 Amended Complaint

to state facts sufficient to state any cause of action against defendants, or any of them.

Therefore:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs Kellam, and each of them, take nothing by reason of this action; and

2. Defendants, and each of them, recover of plaintiffs their respective costs of suit as follows: Safeco $_____; Pfeifer, Spates and Sullivan $_____; Birth $_____.

DATED: August 21, 1979

/s/
JUDGE OF THE SUPERIOR COURT

NOTARIZED STATEMENT OF MAILING HEREOF
Rule 28

State of California) ss
County of Riverside)

I, Richard M. Cantillon, affy that I practice law in said county and state at Suite 222, 3631 10th Street, Riverside, California 92501.

I have been a continuous member in good standing of the bars of this state (California State Bar 1957) and United States Supreme Court (since 1967). I am a natural US citizen, over 18 years of age and not a party hereto.

On Nov 4, 1987, I mailed the original and 40 copies hereof (plaintiff and appellants' Jurisdictional Statement Nov 4, 1987), by placing same, bearing fully prepaid US first-class postage, in the US Mail Box at 10th and Market Sts, Riverside, California; the wrapper bearing my said return address, being addressed so, to wit:

Office of the Clerk
United States Supreme Court
United States Supreme Court Building
Washington, DC 20543

_____
Richard M Cantillon, Affiant

On Nov 4, 1987, before me, the undersigned, a Notary Public in and for said county and state personally appeared Richard M Cantillon, personally known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that its contents were true by swearing thereto, and signing said instrument in my immediate presence, in the city of Riverside, State of California.

_____
Notary Public

BAR MEMBER'S CERTIFICATE
OF SERVICE BY MAIL

Richard M. Cantillon verifies as follows:

I am a member in good standing, of the bar of the United States Supreme Court (since 1967). I office Suite 222, 3631 10th Street, Riverside, California. I am over 18 years of age, a natural US citizen and not a party hereto.

On Nov 5, 1987, I served the following parties, by placing copies of the Jurisdictional Statement in respective wrappers, bearing my return address, fully prepaid US first-class postage & addressed as follows (by depositing same in the US Mail Box, 10th Street & Market, Riverside, California):

District Court of Appeal of California, Room 640
303 W 3rd Street, San Bernardino, Calif 92401

Superior Court, Appeals Section
3470 12th Street, Riverside, Calif 92501

(for M/M Pfeifer) Atty Michael V. Hesse, #105
3576 Arlington Avenue, Riverside, CA 92506

(for the Safeco companies) Best, Best & Krieger
P.O. Box 1028, Riverside, CA 92502

_____

Richard M Cantillon
Certifier

Wednesday
5 November, 1987
City of Riverside
California

Supreme Court, U.S.
FILED
JAN 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-820

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

EDNA S. KELLAM, KATHRYN L. KELLAM and JAMES L. KELLAM,

Appellants,

v.

JAMES P. PFEIFER, SHIRLEY A. PFEIFER, GARRETT K. SPATES, HELEN M. SPATES, THOMAS L. SULLIVAN, PATRICIA J. SULLIVAN, CHRIS LOUKAS, SAFECO TITLE INSURANCE COMPANY, INC., SAFECO BONDING COMPANY, INC., BIRTH DEVELOPMENT COMPANY, INC., RED CORPORATION, BLUE CORPORATION, ROE COMPANY, a co-partnership, RICHARD ROE I to RICHARD ROE X, doing business as ROE COMPANY, a co-partnership, JOHN DOE 2 to JOHN DOE 100, WILLIAM L. DIETERLE,

Appellees.

ON APPEAL FROM THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT OF CALIFORNIA
DIVISION II

MOTION TO DISMISS

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FOR APPELLEE
SAFECO TITLE INSURANCE CO., INC.

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No. 87-820

In The
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October Term, 1987

EDNA S. KELLAM, KATHRYN L. KELLAM and JAMES L. KELLAM,

Appellants,

v.

JAMES P. PFEIFER, SHIRLEY A. PFEIFER, GARRETT K. SPATES, HELEN M. SPATES, THOMAS L. SULLIVAN, PATRICIA J. SULLIVAN, CHRIS LOUKAS, SAFECO TITLE INSURANCE COMPANY, INC., SAFECO BONDING COMPANY, INC., BIRTH DEVELOPMENT COMPANY, INC., RED CORPORATION, BLUE CORPORATION, ROE COMPANY, a co-partnership, RICHARD ROE I to RICHARD ROE X, doing business as ROE COMPANY, a co-partnership, JOHN DOE 2 to JOHN DOE 100, WILLIAM L. DIETERLE,

Appellees.

ON APPEAL FROM THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT OF CALIFORNIA
DIVISION II

MOTION OF SAFECO TITLE INSURANCE CO., INC. TO DISMISS

Pursuant to Rule 16.1, appellee Safeco Title Insurance Co., Inc., respectfully requests this Honorable Court to dismiss the appeal now pending

on the grounds that the federal questions presented were not properly presented to nor passed upon by the California courts; that the judgment rests on an adequate non-federal basis; and that the federal questions presented are so unsubstantial as to require no further argument.

STATEMENT OF FACTS

This is actually the third action in which the appellants Edna S. Kellam, Kathryn L. Kellam and James L. Kellam (the "Kellams") have challenged the validity of a single non-judicial foreclosure sale held in December of 1974 pursuant to a deed of trust.

The property that was the subject of the sale had been owned by the Kellams. It was purchased at a non-judicial foreclosure sale by appellees,

James P. Pfeifer and Shirley A. Pfeifer ("the Pfeifers"), the holders of a third trust deed on the property. After the Pfeifers foreclosed on the property, they were constrained to bring an unlawful detainer action against the Kellams in order to obtain possession. In that unlawful detainer action, the Kellams defended by alleging that the note and third trust deed were illegal; that the Pfeifers were not the assignees with the beneficial interest under the note and third trust deed; that Safeco Title Insurance Co., Inc. ("Safeco") had failed to conduct the foreclosure sale in conformity with California law; that the Pfeifers were not bona fide purchasers of the property; that the Pfeifers were not the owners of the property; and that the California trial court, as a matter of state law, did not have jurisdiction over the case. The

trial court decided the unlawful detainer action against the Kellams. The Kellams initiated an appeal of that action, but subsequently abandoned it.

On August 23, 1974, approximately a week after losing the unlawful detainer action, the Kellams filed a separate complaint in the Superior Court of California, County of Riverside (since referred to by the parties as "Kellam I"). That case sought cancellation of "void instruments," quiet title, slander of title, and equitable relief from the unlawful detainer judgment. The Kellams never asserted any constitutional issues in Kellam I. Safeco and one of its former employees, Chris Loukas, were served with process in Kellam I in December of 1975. In 1979, Loukas was dismissed as a defendant for plaintiff's failure to

return service of process within three years, as required by California law.

Kellam I was the subject of a motion for judgment on the pleadings brought by all of the defendants when the case ultimately came to trial in 1979. The California trial court granted the motion and a judgment of dismissal was entered. The judgment in Kellam I was affirmed by a decision of the California Court of Appeal on May 17, 1982. The Kellams did not pursue further review of that appellate court decision.

In 1979 while the motion for judgment on the pleadings was pending, the Kellams filed a second action ("Kellam II") against the defendants and appellees in this action.

The appeal currently before this Court concerns Kellam II. The second amended complaint in Kellam II alleged seven state law causes of action. Those were: (1) conspiracy and slander of title; (2) cancellation of void deed; (3) cancellation of voidable deed; (4) equitable relief from judgment; (5) equitable relief from judgment; (6) constructive trust; and (7) indemnity. Safeco and the Pfeifers demurred to the second amended complaint on the general grounds of a failure to state a cause of action, res judicata, statute of limitations and on the special ground of another action pending. The trial court sustained Safeco's demurrer without leave to amend.

The Kellams appealed to the California Court of Appeal. The Court of Appeal affirmed the trial court's decision on the ground that the Kellams'

complaint failed to allege a cause of action against either Safeco or the Pfeifers. See, May 15, 1987 Unpublished Opinion of the Court of Appeal, Fourth District, Division II in the State of California #E001226 at p. 7.

It was not until after that opinion, more than a decade after the start of this litigation, that the Kellams attempted to manufacture a federal issue. The Kellams, in a petition for rehearing to the Court of Appeal, did so by raising, for the first time, a federal due process challenge to the courts' decisions upholding California non-judicial foreclosure law. See, Jurisdictional Statement for Appellant ("Jurisdictional Statement") at p. 26. That petition for rehearing was summarily denied. The Kellams then petitioned the California Supreme Court for review of the decision of the Court

of Appeal. On August 12, 1987, that petition was also summarily denied.

Although they never raised federal issues in either the trial court or in two separate hearings before California Courts of Appeal, the Kellams now attempt to invoke the jurisdiction of this Court to hear federal questions -- questions which are neither substantial nor were ever passed upon by a California court in this litigation.

ARGUMENT

I. The Federal Questions Appellants Attempt To Manufacture Were Not Presented To The California Court Of Appeal In A Timely Manner And Were Never Passed Upon. Accordingly, They Cannot Be Used To Invoke The Jurisdiction Of This Court.

In order to invoke the appellate jurisdiction of the United States Supreme Court, an appellant must have raised the federal questions at issue in the state courts in accordance with state procedures. Beck v. State of Washington, 369 U.S. 541, 549-554 (1962). Further, the federal questions must have been passed upon by the state court. 28 U.S.C.A. §1257(2) (West 1966 & Supp. 1987); Illinois v. Gates, 462

U.S. 213, 218 (1983) [The Supreme Court will not decide claims "not pressed nor passed upon" in state court. Id. at 219.]; Hanson v. Denckla, 357 U.S. 235, 243-244 (1958); Sup. Ct. R. 16.1(b). The Kellams' petition for appeal fails both of these tests. As readily can be seen from the text of the California Court of Appeal Decision #E001226 filed May 17, 1987, that court's opinion is completely a matter of state law. See, unpublished opinion of California Court of Appeal, Fourth District, Division II, in the State of California #E001226, filed May 17, 1987, at pp. 5-15.

At no time in the proceedings before the Court of Appeal issued its opinion did the Kellams raise, nor did the court consider, the alleged federal questions that the Kellams now attempt to raise before this Court. Indeed, by the Kellams' own admission, the first

time any federal issues were raised during this protracted and duplicative litigation was in their petition for rehearing in the Court of Appeal of California. Jurisdictional Statement at p. 26.

The Court of Appeal's decision not to consider the petition for rehearing based upon the new contentions of the Kellams was in complete conformity with California law. It is well established that a California appellate court will not consider matters that were not presented to the trial court. Parker v. City of Fountain Valley, 127 Cal. App. 3d 99, 117; 179 Cal. Rptr. 351, 361-362 (1981). Further, a Court of Appeal will not grant a rehearing on issues raised for the first time in a petition for rehearing. County of Sacramento v. Loeb, 160 Cal. App. 3d 446, 459 n.5, 206 Cal. Rptr. 626, 635 (1984); People ex.

rel. Dept. of Public Works v. Mascotti, 206 Cal. App. 2d 772, 779-780; 23 Cal. Rptr. 846, 851 (1962). [Opinion on petition for rehearing is not set forth in California Reporter.] Nor will this Court consider an appeal of an issue which was only presented to the state court by means of a petition for rehearing. Prudential Federal Savings and Loan Association v. Flanigan, 107 S. Ct. 38 (1986); Radio Station WOW v. Johnson, 326 U.S. 120, 128 (1945).

Since the Kellams have attempted to raise federal issues which were not properly presented to the California courts for decision and were not passed upon by any California court in this litigation, the appeal is without merit.

II. The Decision of the California Court of Appeal Rests on an Adequate Non-Federal Basis.

This Court will not review a judgment of a state court if the judgment rests on an adequate state law ground. Hammerstein v. Superior Court of California, 340 U.S. 622, 623 (1950); Sup. Ct. R. 16.1(b).

The state court decision which is the subject of this appeal rests entirely on state law. See, unpublished opinion of the Court of Appeal, Fourth District, Division II in the State of California #E001226, filed May 15, 1987. The Court of Appeal addressed the propriety of the trial court's application of the doctrine of judicial notice; the validity of the Kellams' main cause of action for conspiracy and slander of title; the nature of the relationship

between a trustee under a deed of trust and the trustor; and the soundness of the trial court's decision to sustain a demurrer to the Kellams' complaint after numerous opportunities to amend. No issue of federal law was raised or dealt with by the court.

Since the decision of the Court of Appeal rests solely on state law, there is no basis for this Court to exercise its jurisdiction.

III. The Questions Presented by Appellants Do Not Present Substantial Federal Questions.

In addition to the fact that the Kellams did not properly present their federal questions to the courts below and to the fact that the decision of the Court of Appeal rests entirely on state law, the appeal presented by the Kellams

does not present substantial federal questions.

In Zucht v. King, 260 U.S. 174 (1922), this Court ruled that a federal issue raised by means of writ of error could not be considered when it appeared that the constitutional issues were not substantial. 260 U.S. at 176. In Zucht, a litigant petitioned this Court for an injunction, as well as other relief, against the enforcement of a City ordinance requiring vaccination of all persons attending public schools. Petitioner had raised the constitutional issues in the Texas state courts, but a demurrer to her complaint had been sustained by the Texas Supreme Court. Petitioner's petition for writ of certiorari to this Court was dismissed for failure to comply with the Supreme Court rules. As a result, the petitioner sought review by means of a writ

of error. The petition for writ was dismissed. In doing so, this Court held that a portion of her petition was not within the jurisdiction of the Court, stating:

> [A]lthough the validity of a law was formally drawn into question, it is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not, and was not, at the time of granting the writ [of error], substantial in character. [Citation omitted.] [Id. at 176.]

Although it is not entirely clear, the main thrust of the Kellams' appeal to this Court appears to be that California case law and California statutory law controlling non-judicial foreclosure sales, taken together, create an unconstitutional denial of due process; presumably a denial of the guarantee against the taking of property without due process. See, Jurisdictional Statement at p. i; U.S.

Const. amend. XIV, § 1. This Court has already addressed a similar issue of California law and declined to hear an appeal of the matter because of the lack of a substantial federal issue. Garfinkle v. Superior Court, 21 Cal. 3d 268; 146 Cal. Rptr. 208, 578 P.2d 925, appeal dismissed, 439 U.S. 949 (1978) reh'g. denied, 439 U.S. 1104 (1979).

In Garfinkle, the statutory scheme permitting the sale of property by means of a non-judicial foreclosure sale was attacked as being in violation of the due process guarantees of the fourteenth amendment of the United States Constitution and in violation of the California Constitution. The California Supreme Court held that the non-judicial foreclosure procedure constitutes private action and therefore is not subject to the requirements of the fourteenth amendment. Garfinkle v.

Superior Court, 21 Cal. 3d at 281. This Court refused to hear the appeal of Garfinkle on the ground that it did not present a substantial federal question. 439 U.S. 949. The Kellams are apparently attempting to resurrect substantially the same issues this Court has already held to be unworthy of review. The propriety of a non-judicial foreclosure sale did not present a substantial federal question when Garfinkle was decided and the Kellams have not presented one reason why this case should be treated differently.

The Kellams have also claimed that a question of constitutional dimensions has been created by the trial court's application of the substantive law of res judicata and law of the case. Jurisdictional Statement at p. i.

In support of this contention, the Kellams have cited two cases which

generally state the rule that due process requires a litigant be given "an opportunity to present every available defense." See, Linsay v. Normet, 405 U.S. 56, 66 (1972); American Surety v. Baldwin, 287 U.S. 156, 168 (1932). Neither case even remotely suggests a state court's use of state common law doctrines, to dispose of a case before it, creates a federal question.

In Linsay, appellants were a class of month-to-month tenants who refused to pay their rent because of alleged substandard living conditions. Appellants filed a declaratory relief action challenging an Oregon statutory scheme which, among other things, limited the defenses a tenant could raise in a wrongful detainer action. This Court held that that portion of the Oregon statutes did not violate due process. 405 U.S. at 65. In reaching

that holding, it was noted that as a general rule a litigant was entitled to present every available defense. Id. at 66. This Court reasoned, however, that since the defenses appellant wished to raise could have been asserted in a different action, due process was satisfied.

American Surety 287 U.S. 156 (1932), is similar. In American Surety, a surety company sought relief from a state court judgment on the ground that the judgment was void under the due process clause of the fourteenth amendment. The company had issued an appeal bond to a defendant in a lawsuit to secure the amount of a state court judgment entered against him while he pursued an appeal. The defendant's appeal was decided against him and, as a result, plaintiffs obtained a judgment against the surety company under the

terms of the bond. After being denied relief from the judgment in the state courts, the surety company filed an action in federal court to enjoin the enforcement of the judgment. In federal court, the company contended that it was denied due process because it was not given notice of the hearing in which judgment was entered against it. The federal court of appeals granted the relief requested.

This Court reversed the decision of the federal court of appeals, holding that because the decisions of the state courts were res judicata under state law and because the constitutional issues were not presented in those proceedings, an exercise of jurisdiction to hear the federal issues would have been improper. This Court further held that because state law provided the company with an opportunity to present its

defenses by means of an appeal after judgment, due process was satisfied. 287 U.S. at 168-169. The fact that the company had not availed itself of that process was irrelevant. Id. It is in this context that the Court made the general statement "due process requires that there be an opportunity to present every available defense; but it need not be before entry of judgment." Id. at 168.

There is nothing in the cases cited by the Kellams which could conceivably serve as a basis to claim that the application of the state law doctrines of res judicata and law of the case can be the basis for a substantial federal question. The Kellams have had their day in court. It is disingenuous for them to now claim they have been denied due process.

The Kellams' petition to this Court addresses issues that do not raise substantial federal issues. Their appeal borders on the frivolous.

IV. Appellants' Petition Should Be Dismissed.

The Kellams have attempted to invoke the appellate jurisdiction of this Court under the provisions of Title 28 United States Code Section 1257(2). Section 1257(2) states:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of it being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. [Id.]

As discussed above, the issues now advanced by the Kellams were, in accordance with state law, never decided by the California courts. Consequently, the Kellams cannot possibly rely on Section 1257(2) as a basis to seek appellate review of this case.

Title 28 United States Code Section 2103, provides:

> If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of the state, or from a United States court of appeals, in a case where the proper mode of a review is by a petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damage

for his delay, and single or double costs. [Id.]

If this Court treats the Kellams' appeal as a writ of certiorari, Safeco respectfully submits that the writ should be denied for all the reasons set forth above.

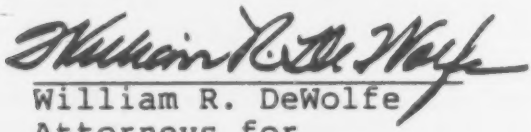
CONCLUSION

In view of the above, Safeco respectfully requests that the appeal of the Kellams be dismissed.

DATED: January 5, 1988

Respectfully submitted,

BEST, BEST & KRIEGER

By: 

William R. DeWolfe
Attorneys for
Appellee Safeco Title
Insurance Co., Inc.

A P P E N D I X

List of Parent and Affiliate Corporations

(Pursuant to Supreme Court Rule 28.1)

APPENDIX

Pursuant to Rule 28.1, Appellee Safeco Title Insurance Co., Inc. submits the following list of parent and affiliate corporations:

Appellee:

Safeco Title Insurance Co., Inc., a California corporation

Parent corporation of Appellee:

Chicago Title and Trust Company, an Illinois corporation

Holding company of Appellee's parent corporation

Alleghany Corporation, a Delaware corporation.

Affiliate corporations of Appellee: (companies also held by Allegheny Corporation and that are not wholly-owned subsidiaries of Appellee):

1) MSL Industries, Inc., a Delaware corporation

2) MSL Acquisition Corporation, a Delaware corporation

Affiliate corporations
of Appellee

(continued)

3) MSL/EGS Corporation, a Delaware corporation

4) MSL/Southwestern Corporation, a Delaware corporation

5) MSL Capital Recovery Corporation, a Delaware corporation

6) J & E Corporation, a Tennessee corporation

7) Allied Structural Steel Corporation, a Tennessee corporation

8) Bibb Steel and Supply Company, a Delaware corporation

9) MSL Property Holdings, Inc., a Delaware corporation

10) The Shelby Insurance Company, an Ohio corporation

11) Shelby Financial Corporation, an Ohio corporation

12) Millsboro Development Corporation, an Ohio corporation

13) Insura Property and Casualty Insurance Company, an Ohio corporation

14) IPBS, Inc., an Ohio corporation

Affiliate corporations of Appellee

(continued)

15) Affirmative Insurance Company, an Ohio corporation

16) Shelby Printing, Inc., an Ohio corporation

17) Chicago Title Insurance Company, a Missouri corporation

18) Alexander Title Agency, Inc., a Virginia corporation

19) Approved Title Corp., a New Hampshire corporation

20) Associated Abstract Company, a Delaware corporation

21) C.T.I. Properties, Inc., a California corporation

22) Chicago Title Agency of Arizona, an Arizona corporation

23) Chicago Title Company of San Diego, Inc., a California corporation

24) Chicago Title Company, a California corporation

25) Tri-Safe, Inc., a non-profit California corporation

26) Chicago Title Insurance Company, a Missouri corporation

27) Chicago Title Company, a California corporation

Affiliate corporations
of Appellee

(continued)

28) Title Records, Inc., a California corporation

29) Chicago Title Company of Alameda, Inc., a California corporation

30) Chicago Title Insurance Company of Puerto Rico, Puerto Rico

31) Citizens Title Service Corporation, an Illinois corporation

32) Creative Land Services, Inc., a Minnesota corporation

33) Experienced Title Company, a California corporation

34) Johnson County Title Company, a Kansas corporation

35) Land Title of Kentucky, a Kentucky corporation

36) McHenry County Title Company, an Illinois corporation

37) S. T. & A. Corp., a New Jersey corporation

38) White River Abstract & Title Co., Inc., an Indiana corporation

39) CTP, Inc., a Florida corporation

40) Dallas Seven Index, Inc., a Texas corporation

Affiliate corporations
of Appellee

(continued)

41) Jax Fax, Inc., a Florida corporation

42) Joint Title Plans and Associations

43) Kansas City TItle Data, Inc., a Missouri corporation

44) Orange County Title Insurance Shippers Association, a California corporation

45) SKLD, Inc., a Colorado corporation

46) Take-Off, Inc., a non-profit Colorado corporation

47) Title Data, Inc., a Texas corporation

48) Chicago Title and Trust Company Foundation, a charitable foundation

49) Estate Services Company of America, an Illinois corporation

50) Fleet Enterprises, Inc., a New York corporation

51) Iowa Land Services Company, an Iowa corporation

52) L C Investment Corporation, an Indiana holding company

53) The Lake County Trust Company, an Indiana corporation

Affiliate corporations of Appellee

(continued)

54) Guardian Title Company of Houston, Inc., a Texas corporation

55) Capital Park Plaza, Inc.

56) Title and Trust Company, an Idaho corporation

57) Pioneer Title Company, a Utah corporation